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No. _____

In the

Supreme Court of the United States

October Term, 1999

BOSS CAPITAL, INC,

Petitioner,

vs.

CITY OF CASSELBERRY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the United States Court of Appeals for the Eleventh Circuit improperly consider and determine a claim over which it had no jurisdiction because of a lack of standing?

II. When the government enacts a prior restraint on free speech, does a provision allowing immediate access to the courts following denial of a permit satisfy the requirement of prompt judicial review, mandated by *Freedman v. Maryland* and *FW/PBS, Inc v. City of Dallas*?

PARTIES

The Petitioner is Boss Capital, Inc., a Florida corporation, the plaintiff in the District Court and the appellant in the Court of Appeals. Boss Capital has no parent corporation or subsidiaries.

The Respondent is the City of Casselberry, a Florida municipal corporation, the defendant in the District Court and the Appellee in the Circuit Court.

All parties to the proceedings below are parties to this Petition.

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In the

Supreme Court of the United States
October Term, 1999

BOSS CAPITAL, INC.

Petitioner,

vs.

CITY OF CASSELBERRY,

Respondent.

Petitioner respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit in *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999)..

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 187 F.3d 1251, and is reproduced at Appendix A to this petition. The unreported opinion of the United States District Court for the Middle District of Florida is reproduced at Appendix C.

JURISDICTION

The Court of Appeals entered its judgment on September 3, 1999. Petitioner timely filed its Petition for Rehearing, which was denied on October 18, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States of America provides that "Congress shall make no law . . . abridging the freedom of speech . . . .

STATUTES INVOLVED

The City of Casselberry regulates adult entertainment businesses through a comprehensive zoning and licensing code. The provisions of that Code pertinent to this Petition are reproduced in the Appendix to the opinion of the United States Court of Appeals for the Eleventh Circuit, and can be found on pages 12a through 18a of the Appendix to this Petition.

STATEMENT OF THE CASE

Boss Capital obtained a business location in the City of Casselberry for the purpose of opening and operating an adult nightclub. [Appendix A, at 2a]. There were three such businesses already operating in the City. [*Id.*, at 4a]. However, the City had enacted a comprehensive adult entertainment zoning and licensing ordinance. Boss Capital claimed the regulation was so restrictive that it prohibited any new adult nightclubs from opening. In fact, each of the three existing night clubs was a nonconforming use, and were allowed to continue in operation only because they were in business before the restrictive zoning provisions were enacted. [*Id.*, at 7a].

The City claimed that there were two locations that met the distance requirements in the zoning ordinance for adult entertainment businesses, in addition to the three existing businesses. [*Id.*, at 4a]. The City further argued that the existence of locations in the City was not critical to the case, because there were three adult nightclubs operating within a short distance from the City limits. [*Id.*] Therefore, the City argued that Casselberry need not allow any new adult entertainment businesses. [*Id.*]

The lawsuit originated with the filing of a complaint in the Middle District of Florida. Jurisdiction was based on 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343. Boss Capital challenged the zoning and licensing regulations, claiming that they violated the First Amendment's guarantee of the right to free expression. [*Id.*, at 2a-3a]. As to the zoning provisions, Boss Capital argued that it was prohibited from opening anywhere in the City by the setback requirements in the ordinance. Boss Capital challenged the licensing provisions on the basis that they failed to provide the procedural safeguards mandated by this Court in *Freedman v. Maryland*, 380 U.S. 51 (1965) and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

On May 13, 1998 the District Court granted the City's Motion for Summary Judgment, upholding both the zoning and licensing provisions. The court did not reach the issue of whether the two locations in the City were "available" for adult entertainment businesses, because it found the market for this entertainment program generally unrestricted. [App. C, at 28a-30a]. It based this finding on language of this Court in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) that suggested – but did not hold – that a *countywide* ordinance restricting locations of live entertainment might be constitutional even if it prohibited live entertainment in one or more municipalities in

the county. [*Id.*].[1] The District Court concluded that the existence of three nightclubs in the City and three more within a reasonable distance met the constitutional requirement imposed by the First Amendment.

The District Court also upheld the licensing sections of the ordinance, finding that they complied with both *Freedman* and *FW/PBS*. The ordinance included a provision allowing an unsuccessful applicant to immediately file suit in state court challenging the denial of the application. The District Court expressly held that under *FW/PBS* the First Amendment only requires that judicial review be promptly available, not that the review include prompt judicial disposition. [*Id.*, at 35a-37a].

Boss Capital filed its appeal to the Eleventh Circuit. That Court vacated the District Court's judgment on the zoning challenge. It held that the District Court must first determine whether the two sites in the City met the distance requirements, as the City had claimed. [App. A, at 6a] If so, the panel suggested that four or five sites in the City probably met the requirements of the First Amendment. [*Id.*]

The Eleventh Circuit then upheld the licensing provisions.[2] It said that *Freedman* only requires prompt judicial review through disposition in censorship cases, not in licensing

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[1] There is no countywide zoning in Seminole County, the county in which Casselberry is located.

[2] At oral argument, counsel for Boss Capital told the panel that if it did not strike down the zoning restrictions, Boss Capital lacked standing to challenge the licensing code.

cases. [*Id.*, at 13a].[3] In its decision, the panel noted an obviously irreconcilable split among the circuits on this point. [*Id.*, at 9a-10a].

On September 24th Boss Capital timely filed its Petition for Rehearing. In that Petition it argued that since the panel had not struck the zoning provisions, it should not have reached the issue of the constitutionality of the licensing sections. That claim was based on the fact that if the zoning provisions were valid, there is no party in the world that could benefit from a favorable decision on the licensing challenge. The three businesses in the City already had licenses, and neither Boss Capital nor anyone else had a location for which a new license application could be filed.

On October 18th, the Eleventh Circuit denied the Petition for Rehearing without opinion. [App. B].[4]

REASONS FOR GRANTING THE WRIT

This Court should issue its writ of certiorari because the Eleventh Circuit panel's decision to consider and rule on the licensing challenge has significantly altered the requirement that a federal court may not consider a claim absent a case or controversy. This basic constitutional rule of standing, rigidly adhered to by the federal courts, says that a party who cannot obtain any relief from a successful attack on a statute or ordinance has no standing to challenge it. Even in cases

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[3] The Circuit Court did not explain why denial of a license, which acts as a total prohibition of speech, is not a form of censorship.

[4] The Court did not require the City to file a response to Boss Capital's Petition.

brought to vindicate rights under the First Amendment, when the traditional rules of standing are somewhat relaxed, this Court has *always* required that there be *some* party that could benefit in some way from a successful challenge to the restriction. As a result of the panel decision, there is no longer a requirement in the Eleventh Circuit that some person have an interest in the outcome of litigation before suit is filed.

There is a second, equally compelling reason for this Court to issue a writ of certiorari. If Boss Capital had the requisite standing to challenge the City's licensing ordinance, this Court should issue the writ to resolve a serious and significant conflict among the circuit courts on a critical issue of constitutional importance: the requirement that any prior restraint of free speech include the availability for prompt judicial review. The split is so serious and so significant that the several circuits that have ruled on the issue have been unable to determine with certainty what the other circuits have held. As a further consequence of the split, district courts in circuits that have not passed on the question are reaching conflicting results.

I. In deciding a major issue in this case even though no person had any interest in the outcome, the Circuit Court refused to follow this Court's decision in *FW/PBS, Inc. v. City of Dallas*.

Unless this Court issues its writ of certiorari, a litigant in the Eleventh Circuit will no longer be required to have

standing to challenge a licensing ordinance regulating First Amendment activities. In effect, the Eleventh Circuit panel has said that any party can challenge a licensing ordinance, whether or not that party can ever obtain a license, and whether or not a successful challenge could ever benefit anyone! This is directly contrary to this Court's decision in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), and is a departure from well-established rules of standing that could open the federal courts to litigation for litigation's sake:

> The federal courts are under an independent obligation to examine their own jurisdiction, and standing "is perhaps the most important of [the jurisdictional] doctrines." *Allen v. Wright*, 468 U.S. 737, 750 (1984).
>
> *FW/PBS*, 493 U.S. at 231.

In *FW/PBS*, suit was brought to challenge zoning and licensing provisions of a Dallas ordinance regulating adult entertainment businesses. *Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986). The district court upheld most of the ordinance, and the Fifth Circuit generally affirmed. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988). This Court granted review.

In the principal portion of the Court's opinion, the Court found the licensing sections of the ordinance to be an unconstitutional prior restraint of free speech. However, and

critical to this Petition, another part of the Court's opinion dealt directly with the jurisdictional issue of standing to challenge some of the ordinance's provisions. And the Court stated very clearly that when it does not appear affirmatively on the record that some party has an interest in the outcome of a challenge to a particular claim, the federal courts cannot entertain that challenge.

The Dallas ordinance included a provision that a person was not eligible to receive a license if he or she were living with another person who had had a license denied or revoked. Another provision disqualified persons who had been convicted or certain enumerated offenses. The lower courts had upheld both provisions.

This Court conducted the required examination of the record, consistent with its constitutional duty, to determine whether the two provisions were properly before the federal courts:

> First, the record does not reveal that any party before us was living with an individual whose license application was denied or whose license was revoked. Therefore, no party has standing with respect to § 41A-5(a)(5). Second, § 41A-5(a)(10) applies to applicants whose spouses have been convicted of any of the enumerated crimes, but the record reveals only one individual who could be disabled

> under this provision. An individual, who had been convicted under the Texas Controlled Substances Act, asserts that his wife was interested in opening a sexually oriented business. But the wife, although an officer of petitioner Bi-Ti Enterprises, Inc., is not an applicant for a license or a party to this action. See 12 Record, Evert Affidavit 3-6. Cf. *Bender*, 475 U.S., at 548, and n. 9, 106 S.Ct., at 1335, and n. 9.
>
> Even if the wife did have standing, her claim would now be moot. Her husband's convictions under the Texas Controlled Substances Act would not now disable her from obtaining a license to operate a sexually oriented business, because the city council, following the District Court's decision, deleted the provision disabling those with convictions under the Texas Controlled Substances Act or Dangerous Drugs Act. App.H. to Pet. for Cert. in No. 87-2012, p. 107. *See Hall v. Beals*, 396 U.S. 45, 48 (1969).
>
> 493 U.S. at 233-34.

This Court held that the challenges to these provisions should not be allowed:

> Examination of the record here reveals that no party has standing to challenge the provision involving those residing with individuals whose licenses were denied or revoked. Nor does any party have standing to challenge the civil disability provision disabling applicants who were either convicted of the specified offenses or whose spouses were convicted.
>
> 493 U.S. at 233.

In *FW/PBS*, there may well have been persons who had the requisite standing. It is not at all unlikely that some person in Dallas interested in obtaining an adult entertainment license had been convicted of one of the listed offenses. It is equally likely that there was a person who was disqualified because he or she was living with another disqualified person. But there was no such person as a party to the case, nor did the record reveal demonstrate that such a person actually, as opposed to theoretically, exist![5] Even in a case raising significant First Amendment issues, this Court still demanded that the record reveal some actual person with an interest in the outcome of the case.

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[5] Even a concession by the City at oral argument that some of the parties actually had been disqualified by the challenged provisions was insufficient to demonstrate standing. 493 U.S. at 235.

In the instant case, the situation is far worse than that in *FW/PBS*. In that case, everyone – including this Court – recognized that there may well be persons who would meet the standing requirement. In this case, the record clearly shows that there is no person *in the world* that could meet the test.

First, there are only three adult entertainment businesses in the City, and those businesses all have licenses. *Boss Capital*, App. 4a. Unless there are other locations in the City where one may apply for a license, there are no persons who would have any interest in the outcome of the licensing challenge. And the record in this case *does not affirmatively establish* that there are any other locations in the City for adult entertainment businesses. *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884); *FW/PBS*, 493 U.S. at 231.

After finding that no party had standing to challenge the disqualification provisions of the Dallas ordinance – even in a representative capacity often recognized in First Amendment cases – this Court vacated that portion of the Fifth Circuit opinion, and remanded those issues to the Court of Appeals with instructions that they be dismissed. The Court should do the same in this case. The licensing provisions should not have been considered by the Eleventh Circuit panel.[6] That portion of the panel decision should be vacated, and the Eleventh Circuit should be instructed to dismiss that portion of the appeal.

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[6] The District Court should not have ruled on the licensing provisions once it ruled that the zoning restrictions were valid. It should have dismissed those claims.

II. There is a serious conflict among the circuits as to the requirement of "prompt judicial review."

In 1965, this Court decided the landmark case of *Freedman v. Maryland*, 380 U.S. 51 (1965). The case involved a state scheme which required movie exhibitors to submit every film to a review board in order to obtain a license for showing the film in the state. The Court held that whenever the government imposes a prior restraint on free speech through a permit scheme, that scheme must contain three procedural safeguards. One of those safeguards requires the availability of prompt judicial review if a license is denied. 380 U.S. at 59. *See also, FW/PBS*, 493 U.S. at 228 (" . . . there must be the possibility of prompt judicial review in the event that the license is erroneously denied . . . .").

In *Freedman* the Court made it clear that the term "prompt judicial review" meant more than prompt access to the judicial system. The Court talked about prompt judicial review *through disposition of the prior restraint claim*:

> . . . Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying

> the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. *See Bantam Books, Inc. v. Sullivan, supra.* Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.
>
> *Id.*

That phrase – prompt judicial review – so clearly defined in *Freedman* and subsequent cases, is no longer so clear. As the Eleventh Circuit panel noted, there is a serious split among the circuits as to just what that phrase means after this Court's decision in *FW/PBS*. That split must be resolved by this Court.[7]

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[7] The problem is not limited to adult entertainment cases. The Second Circuit recently stated that even when a permit is denied for a public rally in a public park, a traditional public forum, prompt judicial access is all that is required. If the review process takes so long that the public issue speech is forever denied because of the topicality of the subject, that is unfortunate but not unconstitutional, said the Second Circuit. *Beal v. Stern*, 184 F.3d 117, 129 (2nd Cir. 1999) (". . . prompt access to judicial review in state courts would satisfy *Freedman*, and there is some evidence in the record that such access is available."). Thus, the confusion about what is meant by prompt judicial review threatens core political

In *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (*en banc*), *cert. denied*, 511 U.S. 1085 (1994), five judges said that a permitting ordinance that provides for judicial review by writ of common law certiorari is all that is required under *Freedman*, and that access to the courts, not final judicial determination, is all the First Amendment requires. However, five judges disagreed, and two judges expressed no opinion. Therefore, there was no holding on this point.[8]

Then the Fourth Circuit decided *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988 (3rd Cir. 1995)(*en banc*), *cert. denied*, 516 U.S. 1010 (1995). That Court took an entirely different position on the term "prompt judicial review," and provided a critical analysis of *Graff*:

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speech, the type of speech that occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980).

[8] The fact that this was not a holding in *Graff* did not prevent a 3-judge panel in a later Seventh Circuit case to say: "The opportunity to apply for that writ [of common-law certiorari] is enough, *we have held*, even when rights under the first amendment are at stake. *Graff v. Chicago*, 9 F.3d 1309, 1323-25 (7th Cir. 1993)(en banc)." *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994)(emphasis added).

Graff was an en banc decision of the Seventh Circuit in which twelve judges participated. The appeal produced a badly divided court, much like *FW/PBS* itself. In addressing the argument that a Chicago licensing scheme for newsstands did not provide "prompt judicial review," the "principal opinion" authored by Judge Manion concluded that although the Chicago scheme did not itself provide for judicial review, judicial review of the licensing decision was available through a common-law writ of certiorari. Although Judge Manion's opinion apparently concludes that this review is adequate to satisfy the "prompt judicial review" requirement, it does not discuss whether the procedures available for a common-law writ require a prompt judicial decision. And, of critical importance, only five judges (including Judge Manion) joined this principal opinion . . . Therefore, Judge Manion's opinion is not a majority opinion of the Seventh Circuit. Interestingly, the seven judges who wrote to concur in the judgment or dissent all indicated their disagreement with Judge Manion's conclusion that the mere availability of judicial review satisfied the prompt judicial review requirement. Thus, the *Graff*

> decision does not hold that the prompt judicial review requirement is satisfied when judicial review is merely available.
>
> 58 F.3d at 1004, n.17.

The division among the circuits has grown considerable since *Graff* and *11126 Baltimore Blvd.*. It was expressly recognized by the panel in this case:

> This difference between Justice O'Connor's and Justice Brennan's characterizations of the right to prompt judicial review has spawned a split in the circuits. The First, Fifth and Seventh Circuits hold that for licensing ordinances, prompt judicial review only means access to prompt judicial review. *See TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir.1994), followed in *Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068, 1070-71 (5th Cir.1994) (per curiam); *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir.1993) (en banc); *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir.1993). On the other side are the Fourth and Ninth Circuits and arguably the Sixth, which hold that *Freedman* and *FW/PBS* require a guarantee of prompt judicial resolution. *See Baby Tam & Co. v.*

> *City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir.1998), followed in *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir.1999); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988, 998- 1001 (4th Cir.1995) (en banc); *cf. East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir.1995) (state certiorari procedures an insufficient guarantee of prompt judicial review).
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> App. A at 7a-8a.

Of interest, the different circuits are not even sure of what the other circuits are holding on this very important issue of First Amendment jurisprudence! As noted above, one panel in the Seventh Circuit said that *Graff* stands for the proposition that prompt judicial access is sufficient under *Freedman*. *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994) The Fourth Circuit took another view of *Graff* in *11126 Baltimore Blvd.* According to the Ninth Circuit in *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir.1998), and the Sixth Circuit in *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir.1995), the Eleventh Circuit, in *Redner v. Dean*, 29 F.3d 1495 (11th Cir.1994), had sided with the Fourth Circuit's position. The panel in this case said that *Redner* didn't decide the question at all! App. A, at 6a. In this case the panel said the law in the Eleventh Circuit –

the Circuit with the First,[9] Second,[10] Fifth[11] and Seventh Circuits[12] and in conflict with the Fourth,[13] Sixth[14] and Ninth Circuits[15] – is that *Freedman* is satisfied when a licensing ordinance provides prompt judicial access to the courts after denial of a license. Whether that review is prompt is constitutionally irrelevant.

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[9] *Jews for Jesus, Inc. v. Mass. Bay Trans. Auth.*, 984 F.2d 1319 (1st Cir. 1993).

[10] *Beal v. Stern*, 184 F.3d 117 (2nd Cir. 1999).

[11] *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir.1994), followed in *Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068, 1070-71 (5th Cir.1994) (per curiam)

[12] *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1994).

[13] *11126 Baltimore Blvd., Inc. v. Prince George's County*; 58 F.3d 988 (4th Cir. 1995)(en banc), *cert.* denied, 516 U.S. 1010 (1995); *Chesapeake B & M, Inc. v. Harford County, Md.*, 58 F.3d 1005 (4th Cir. 1995), *cert. denied*, 516 U.S. 1010 (1995).

[14] *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995).

[15] *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998); *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir.1999)

The split among the circuits is causing inconsistency in decisions of the district courts in circuits that have not yet ruled on the issue. For example, in *Books, Inc. v. Pottawattamie County*, 978 F. Supp. 1247 (S.D. Iowa 1997) the district court adopted the same position as the district court in this case:

> It is not clear what, if anything, the *FW/PBS* Court meant by including the requirement of "prompt judicial review" in a municipal ordinance. The Eighth Circuit Court of Appeals has not interpreted this requirement. Other circuits appear split on whether the Court meant to require a "prompt judicial determination." *See 11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988 (4th Cir.1995); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir.1995); *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir.1994); *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir.1993); *Jews for Jesus, Inc. v. Massachusetts Bay Trans. Auth.*, 984 F.2d 1319 (1st Cir.1993). This court finds those courts' reasoning which would require a county to attempt the impossible, namely forcing a state or federal court to decide, to be unreasonable and unpersuasive.
>
> 978 F. Supp. at 1255, fn. 7.

In *Franken Equities, L.L.C. v. City of Evanston*, 967 F. Supp. 1233 (D. Wyoming 1997) that district court took the exact opposite position. The court noted the conflict between the circuits:

> Since the *FW/PBS* decision, at least two courts of appeals concluded that prompt access to the courts did not satisfy the prompt judicial review requirement. Instead, these courts determined that prompt adjudication is required. *See East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir.1995); *11126 Baltimore v. Prince George's County, Maryland*, 58 F.3d 988, 998-1001 (4th Cir.1995). Other courts of appeals found that prompt access to the courts satisfies the prompt judicial review requirement. *See Graff v. Chicago*, 9 F.3d 1309, 1324-25 (7th Cir.1993) (en banc); *TK's Video v. Denton County*, 24 F.3d 705, 709 (5th Cir.1994); *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir.1993).
>
> 967 F. Supp. at 1238-39.

The court then said: "[T]he Court concludes that the prompt judicial review requirement mandates prompt judicial resolution rather than mere access to the courts within a brief period." 967

F. Supp. at 1239. The court added:

> If a party is granted immediate access to the state courts upon an adverse administrative ruling, but the state courts, often with elected judges, are given no deadline for rendering decisions, protected speech is necessarily abridged pending final judicial resolution.
>
> *Id.*

No one could disagree with Boss Capital's claim that this issue has so divided the circuits that there is no consistent principle of law applicable to the fifty states. Citizens in some states have greater constitutional protection for their right to free speech (of all types) than citizens of other states. The circuit courts are divided; the district courts are divided; and the situation is so muddled that the circuits cannot even determine what each other has held. This situation cries out for resolution by this Court.

CONCLUSION

As argued herein, this Court should grant this Petition, vacate that portion of the panel opinion upholding the Casselberry licensing ordinance, and remand to the Eleventh Circuit with instructions to dismiss that portion of the appeal. Otherwise, the constitutional requirement that a litigant possess standing as an irreducible requirement of bringing suit will no

longer apply in the Eleventh Circuit. Anyone with a desire to challenge a licensing ordinance can do so.

However, if the Court, after a *de novo* review, finds that Boss Capital had the requisite standing to bring its licensing challenge to the Eleventh Circuit, the Court should grant the Petition to resolve the horrible conflict among the circuits on the issue of prompt judicial review. Vital First Amendment interests are at stake here, and as argued herein, *all* speech in those circuits applying the "prompt judicial access" approach is at risk, from sexually oriented speech at the "outer perimeters of the First Amendment," *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991) to core political speech, described by this Court as the very essence of self-government.[16] *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). As Judge Ripple wrote in his concurring opinion in *Graff*, discussing the prompt judicial review issue:

> The significant number of opinions already filed in this case would, under most circumstances, be a substantial disincentive to another contribution by a single member

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[16] Boss Capital cannot overemphasize that this case involves a serious threat to all speech requiring a license. While some would question the value of Boss Capital's entertainment as speech, no one argues with the value of core political speech. In the Eleventh Circuit, speech that is unpopular with the government is now at significant risk, even in a traditional public forum.

> of the court. The eyes of the bench and bar, and certainly those of the Justices of the Supreme Court of the United States who will undoubtedly be asked to review our work, are a fragile national resource. Under the unique circumstances presented here, however, an addition to the dialogue is justified because this case presents a most difficult problem for the court, a problem that, in the final analysis, can only be resolved by additional guidance from the Supreme Court of the United States. Under such circumstances, we have an obligation to examine thoroughly the matter while it is before us.
>
> *Graff v. City of Chicago*, 9 F.3d at 1333

For the foregoing reasons, Boss Capital, Inc. respectfully petitions this Honorable Court for a Writ of Certiorari.

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Attorney for Petitioner

APPENDIX A

Opinion of the United States Court of Appeals for the Eleventh Circuit, dated September 3, 1999

BOSS CAPITAL, INC., a Florida corporation, Plaintiff-Appellant,

v.

CITY OF CASSELBERRY, a Florida municipal corporation, Defendant-Appellee.

No. 98-2802.

Before DUBINA and HULL, Circuit Judges, and O'KELLEY, Senior District Judge.[1]

DUBINA, Circuit Judge:

Boss Capital, Inc. owns strip clubs. It wants to open a club in a building it leases in Casselberry, Florida, but Casselberry's zoning ordinance prohibits it from operating at that location. In this appeal, Boss Capital challenges the constitutionality of Casselberry's zoning ordinance. It also challenges the constitutionality of the licensing provisions of Casselberry's adult entertainment ordinance. The district court granted summary judgment for Casselberry on both of these claims. We conclude that the licensing provisions are valid but that the validity of the zoning provision turns on a factual question the district court left unresolved. We therefore affirm in part and remand this case to the district court with

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1. Honorable William C. O'Kelley, Senior U.S. District Judge for the Northern District of Georgia, sitting by designation.

instructions to reconsider the validity of the zoning provisions in light of this opinion.

I.

We address the zoning ordinance first. An adult entertainment establishment in Casselberry may operate only in the C-G (Commercial-General) zoning district, but even within that zone, it may not operate within 1000 feet of a church, a school, a public park or recreation area, another adult entertainment establishment, or an area zoned for residential use. See Casselberry Code art. III, s 14-75(a) (reprinted in appendix). The ordinance grandfathers establishments in existence in Casselberry as of the ordinance's effective date. See Casselberry Code art. III, s 14-76(a) (reprinted in appendix). All the parties agree that if one of the existing establishments closes, a new adult entertainment establishment may operate in the same location as a "nonconforming use" until the use "is removed or abandoned, or ceases for a continuous period of more than 90 days." Casselberry Code part III, s 2-8.9 (reprinted in appendix).

Boss Capital leased a building in Casselberry with plans to open a strip club there. The building is almost 1000 feet from residentially zoned property, but almost wasn't good enough. Casselberry refused to permit Boss Capital to use the site for adult entertainment.

Appropriately, the district court turned to *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), to decide whether Casselberry's zoning ordinance is constitutional. That case holds that municipalities may constitutionally apply zoning regulations to nude dancing establishments as long as the regulations are narrowly tailored to serve a substantial government interest and leave open reasonable alternative avenues of expression. See id. at 50-54,

106 S.Ct. 925. The dispute in this case is whether Casselberry's zoning ordinance leaves open reasonable alternative avenues of expression.

Whether a zoning ordinance leaves open reasonable alternative avenues of expression depends on how many sites are available. *See Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1361 (11th Cir.1999). Availability, in turn, is a matter of economics. A site is available for our purposes as long as adult entertainment establishments may vie for it in the real estate market "on an equal footing with other prospective purchasers and lessees." City of Renton, 475 U.S. at 54, 106 S.Ct. 925.

The district court counted six available sites. Two other sites might be available, but factual questions kept the court from deciding on summary judgment whether they are actually available. The district court left those questions unresolved because it held that six sites are enough for a city of Casselberry's population (24,100).

Boss Capital does not appear to dispute that six are enough. Rather, it argues that the six sites the district court included should not count. Three of the sites are outside the city limits. Casselberry insists that these sites should count because they are close to town (978 feet, 121 feet and 1.25 miles). The other three sites the district court counted are in Casselberry, but they are grandfathered sites that do not comply with the ordinance's distance requirements.

Whether a site is available is generally a factual question, but whether the sites outside Casselberry's borders and the grandfathered sites count are legal questions which the district court resolved on summary judgment and we review de novo. *See Parks v. City of Warner Robins*, 43 F.3d 609, 612-13

(11th Cir.1995).

A.

We turn first to the grandfathered sites. The ordinance permits the current occupants to remain where they are for as long as they want, but a new occupant may only operate an adult entertainment establishment at one of the grandfathered sites if no more than 90 days has passed since the last adult entertainment establishment operated there. See Casselberry Code art. 3, s 14- 76(a); id. part III, s 2-8.9. The likelihood that a shoe store or a grocery will move into one of the sites, or that one of the sites will sit vacant for more than 90 days, is, if not great, at least significant. If any of those things happen, the site is no longer available.

Still, for now at least, the three (defeasibly) grandfathered sites are available. Boss Capital has every right to outbid its competitors and buy or lease one of the grandfathered sites out from under one of the current occupants. This convinces us to include the grandfathered sites in the "reasonable alternative avenues of expression" equation.

B.

That leaves the three sites outside the city limits. Whether Casselberry may rely on those sites is an issue this court has not yet faced, although the Supreme Court has faced it and left the question open. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981); *id.* at 78, 101 S.Ct. 2176 (Blackmun, J., concurring). We opt to leave it open as well because it is our custom not to decide difficult constitutional questions unless we must. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). The district court noted that one or two other sites might be available inside the city limits. If they are, we probably will not

have to decide whether the sites outside the city limits should count because four or five sites are most likely adequate for Casselberry.

We do not hold, however, that three sites alone are inadequate for Casselberry. That question too is a difficult one we might not need to decide. Instead, we remand this case to the district court for it to resolve whether the sites inside the city limits are actually available. Then, if it must, it should consider whether the available sites constitute reasonable alternative avenues of expression.

In deciding whether three or four or five sites constitute reasonable alternative avenues of expression, the district court should consider more than just Casselberry's population. It should also consider Casselberry's geographical size, the number of acres available to adult entertainment establishments as a percentage of that size, where the sites are located, the number of adult entertainment establishments currently in existence in Casselberry, and the number of adult entertainment establishments wanting to operate in Casselberry. In short, whether a given number of sites constitutes reasonable alternative avenues of expression is an issue to be resolved on a case-by-case basis, taking into account any factors that may affect whether adult entertainment establishments are on "equal footing with other prospective purchasers and lessees." *City of Renton*, 475 U.S. at 54, 106 S.Ct. 925; *see also Int'l Food & Beverage Sys. v. City of Ft. Lauderdale*, 794 F.2d 1520, 1526 (11th Cir.1986)(referring to "community needs, the incidence of nude bars in other comparable communities, the goals of the city plan, and the kind of city the plans works towards").

In light of this, we affirm the district court's judgment insofar as it held that the grandfathered sites may be considered in the "reasonable alternative avenues of expression" equation.

In light of this, we affirm the district court's judgment insofar as it held that the grandfathered sites may be considered in the "reasonable alternative avenues of expression" equation. In accordance with our custom of only deciding difficult constitutional questions when necessary, however, we remand this case to the district court for it to determine whether one or two more sites are available inside the city limits. If need be, the district court should then decide whether the total number of sites constitutes reasonable alternative avenues of expression.

II.

We now turn to Casselberry's adult entertainment licensing ordinance, to which Boss Capital has two objections. Its first objection is that the ordinance does not provide for prompt judicial review in compliance with *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), because it does not guarantee that courts will promptly resolve appeals from administrative license denials. Second, it contends that the ordinance gives licensing officials too much discretion in violation of *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969).

A.

We have twice pretermitted the question whether *Freedman* 's requirement of prompt judicial review, as reflected in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (plurality opinion), requires licensing ordinances to explicitly provide for prompt judicial review. *See Lady J. Lingerie*, 176 F.3d at 1363; *Redner v. Dean*, 29 F.3d 1495, 1501-02 & n. 9 (11th Cir.1994) (discussing *Cent. Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir.1985); *Miami Herald Publ'g Co. v. City of Hallandale*, 734 F.2d 666, 675-76 (11th Cir.1984)). As we have observed, a

general right to judicial review of administrative decisions may be enough. Casselberry's ordinance contains an explicit judicial review provision, see Casselberry Code art. III, s 14- 99(c) (reprinted in appendix), so the question in this case is slightly different: whether *Freedman* and *FW/PBS* require a guarantee of prompt judicial resolution of license denials.

This is an issue on which there has been some disagreement since the Supreme Court decided *FW/PBS*. Justice O'Connor's plurality opinion in that case says that "there must be the possibility of prompt judicial review in the event that [a] license is erroneously denied." *FW/PBS*, 493 U.S. at 228, 110 S.Ct. 596 (emphasis added). Later she says that the Dallas ordinance violates the First Amendment because "[i]t also fails to provide an avenue for prompt judicial review . . ." *Id.* at 229, 110 S.Ct. 596 (emphasis added). In concurrence, Justice Brennan does not explicitly disagree with the plurality opinion on this issue, but he characterizes the right to prompt judicial review differently, referring to it as the right to "a prompt judicial determination." *Id.* at 239, 110 S.Ct. 596 (Brennan, J., concurring) (citing *Freedman*, 380 U.S. at 58-59, 85 S.Ct. 734).

This difference between Justice O'Connor's and Justice Brennan's characterizations of the right to prompt judicial review has spawned a split in the circuits. The First, Fifth and Seventh Circuits hold that for licensing ordinances, prompt judicial review only means access to prompt judicial review. *See TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir.1994), followed in *Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068, 1070-71 (5th Cir.1994) (per curiam); *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir.1993) (en banc); *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir.1993). On the other side are the Fourth and Ninth Circuits and arguably the Sixth, which hold

that *Freedman* and *FW/PBS* require a guarantee of prompt judicial resolution. *See Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir.1998), followed in *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir.1999); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988, 998- 1001 (4th Cir.1995) (en banc); *cf. East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir.1995) (state certiorari procedures an insufficient guarantee of prompt judicial review).

We have not yet decided whether *Freedman* and *FW/PBS* require municipalities to guarantee prompt judicial resolution of appeals from license denials. In *Redner*, the Citrus County ordinance did not even provide access to prompt judicial review. See 29 F.3d at 1501-02. We did not hold that mere access is insufficient. But see *4805 Convoy*, 183 F.3d at 1108 n.7 (reading *Redner* as saying that access to judicial review is insufficient). We address that issue for the first time today.

Boss Capital makes a good argument that *Freedman* requires prompt judicial resolution of censorship decisions, but in the end we conclude that access to prompt judicial review is sufficient for licensing decisions. *Freedman* itself unmistakably requires "a prompt final judicial decision." 380 U.S. at 59, 85 S.Ct. 734; *see also id.* ("final judicial determination on the merits"; "judicial resolution"). Moreover, *Freedman* ' s progeny also require an assurance of a prompt judicial decision. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. at 560, 95 S.Ct. 1239 ("a prompt final judicial determination must be assured") (1975); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 371-74, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971) (plurality opinion) (in Part I of the plurality opinion, joined by six Justices, imposing time limits for completion of judicial proceedings in obscenity forfeiture cases); *Blount v.*

Rizzi, 400 U.S. 410, 417, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971) ("a final judicial determination on the merits within a specified, brief period").

Still, none of these pre-*FW/PBS* cases involved a licensing ordinance for adult entertainment establishments. Instead they involved censorship. In *Freedman*, for instance, state law authorized public officials to ban movies it found to be obscene. 380 U.S. at 52-53 n. 2, 85 S.Ct. 734. For good reason, *Freedman* ascribes great importance to prompt judicial resolution of the validity of these sorts of decisions; courts' relative institutional insulation from political pressures makes them less apt to erroneously suppress unpopular expression. See Henry P. Monaghan, *First Amendment "Due Process"*, 83 Harv. L.Rev. 518, 520-24 (1970).

The dangers of censorship are less threatening when it comes to licensing schemes. Unlike censors, who pass judgment on the content of expression, licensing officials look at more mundane and ministerial factors in deciding whether to issue a license. *See 11126 Baltimore Boulevard*, 58 F.3d at 1003 (Niemeyer, J., concurring in part and dissenting in part) (no need for a guarantee of a prompt judicial decision in the absence of a direct prior restraint on speech); see also *FW/PBS*, 493 U.S. at 229, 110 S.Ct. 596 (Licensing officials do not pass judgment "on the content of any protected speech"; rather, they look at "the general qualifications of each license applicant, a ministerial action that is not presumptively invalid."). Indeed, *Shuttlesworth* limits licensing officials to the mundane and the ministerial. *See Lady J. Lingerie*, 176 F.3d at 1362 (holding that *Shuttlesworth* requires licensing standards to be "precise and objective"). Furthermore, applicants for adult entertainment licenses, unlike movie distributors who might show a given film in hundreds of theaters around the country, have every incentive to stick it out and see litigation through to its end. *Cf.*

FW/PBS, 493 U.S. at 229-30, 110 S.Ct. 596 (plurality opinion) (no need to put burden of going to court and burden of proof on licensing officials because license applicants have the incentive to go to court). The need for a prompt judicial decision is therefore less compelling for licensing ordinances than for censorship schemes.

In sum, although *Freedman* appears to require prompt judicial resolution of censorship decisions, licensing decisions are different. We believe this is a situation for "treating unlike things differently according to their differences." *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1342 (11th Cir.1999) (en banc). Accordingly, we agree with the First, Fifth and Seventh Circuits and hold that access to prompt judicial review is sufficient for adult entertainment licensing ordinances. Casselberry's ordinance provides that access: "Any decision of the Community Development Department pursuant to Division 2 (License) may be immediately reviewed as a matter of right by the Circuit Court upon the filing of an appropriate pleading by an aggrieved party." Casselberry Code art. III, s 14-99(c) (emphasis added). We therefore conclude that Casselberry's ordinance does not run afoul of *Freedman*.

B.

Boss Capital also contends that Casselberry's adult entertainment licensing ordinance is invalid because it gives licensing officials too much discretion in violation of *Shuttlesworth*. Whatever the merits of this argument, we conclude that Boss Capital has not preserved this issue for appeal. Boss Capital's first complaint raised the issue, but Casselberry has since repealed one of the provisions to which Boss Capital initially objected. After that, Boss Capital scarcely mentioned the issue before filing its brief with us. The district court did not address the issue. This is not enough to preserve

an issue for appeal, so we decline to address it. *See Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir.1995) (en banc).

III.

In conclusion, we hold that Casselberry's licensing ordinance is valid and that its zoning ordinance might be, depending on the district court's determination on remand whether any additional sites are available for adult entertainment establishments.

AFFIRMED in part and REMANDED.

APPENDIX
Casselberry Code of Ordinances
ARTICLE III. ADULT ENTERTAINMENT ESTABLISHMENTS

DIVISION 1. GENERALLY

Sec. 14-66. Definitions.

The following words, terms and phrases, when used in this Article, shall have the meanings ascribed to them in this Section, except where the context clearly indicates a different meaning:

* * *

Adult Performance Establishment

(a) shall mean an establishment where any employee:

(1) engages in a private performance or displays or exposes any specified anatomical areas to a patron, regardless of whether the employee actually engages in dancing:

(2) wears any covering, tape, pastie, or other device which simulates or otherwise gives the appearance of the display or exposure of any specified anatomical areas, regardless of whether the employee actually engages in dancing:

(3) offers, solicits, or contracts to dance or perform with a patron and accepts any consideration, tip, remuneration or compensation from or on behalf of that person: or

(4) dances or performs with or within three (3) feet of a patron and accepts any consideration, tip, remuneration, or compensation from or on behalf of that person.

(b) It is an affirmative defense that an establishment is not an adult performance establishment if the establishment is a bona fide private club whose membership as a whole engages in social nudism or naturalism as in a nudist resort or camp, or such other establishment in which the predominant business or attraction of the establishment is not the offering to customers of a product, service, or entertainment which is intended to provide sexual stimulation or sexual gratification to such customers, and the establishment is not distinguished by an emphasis on or the advertising or promotion of materials relating to or employees depicting, describing, displaying, exposing, or simulating sexual activities or specified anatomical areas.

(c) An adult entertainment establishment shall not be deemed a place provided or set apart for the purpose of exposing or exhibiting a person's sexual organs in a manner contrary to the first sentence of Section 800.03, Florida Statutes, the State's indecent exposure statute as set forth in the decision of the Supreme Court of Florida in the case of Hoffman v. Carson, 250 So.2d 891 (Fla.1971), appeal dismissed 404 U.S. 981, 92 S.Ct. 453, 30 L.Ed.2d 365 (1971).

Adult entertainment establishment means an adult arcade, adult bookstore, adult motel, adult performance establishment, or adult theater.

* * *

Residential zoning district means any area legally zoned or designated by an adopted comprehensive plan in a manner primarily intended for dwellings.

* * *

Sec. 14-74. Location generally.

All adult entertainment establishments within the City of Casselberry, Florida shall be limited to the C-G (Commercial-General) zoning district and shall be subject to all restrictions enumerated in this Code.

Sec. 14-75. Prohibited locations.

(a) No person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an adult entertainment establishment within 1,000 feet of any other adult entertainment establishment or any church, school, public park or public recreation area, or within 1,000 feet of an area

zoned for residential use or designated by an adopted comprehensive plan in a manner primarily intended for dwellings. For purposes of this Section, the term "substantial enlargement" shall mean increasing the size of the permitted or licensed premises by more than ten percent of the original licensed premises.

(b) For the purposes of this Section, distance measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest property line of the property used as an adult entertainment establishment to the nearest property line of the premises of a church, school, public park or public recreation area, or to the nearest boundary of any area legally zoned or designated by a comprehensive plan in a manner primarily intended for dwellings, without regard to municipal boundaries. Measurement of distances between adult entertainment establishments shall be from lot line to lot line at their nearest points.

Sec. 14-76. Nonconforming uses.

(a) Generally. An adult entertainment establishment which, on the effective date of the ordinance from which this Article is derived, does not comply with the distance requirements of Section 14-75, shall be subject to the nonconforming use provisions contained in the zoning code of the City.

(b) Residential rezoning. If an area is zoned residential or designated by a comprehensive plan in a manner primarily intended for dwellings for the first time, or if an area is

rezoned for residential use or redesignated by a comprehensive plan in a manner primarily intended for dwellings and lies within 1,000 feet of an existing adult entertainment establishment, the adult entertainment establishment shall be considered an existing nonconforming use, as defined in Subsection (a) of this Section, from the effective date of the rezoning ordinance.

DIVISION 2. LICENSE

Sec. 14-96. Required; business classifications.

(a) It shall be unlawful for any person to operate an adult entertainment establishment without having first obtained an adult entertainment license issued by the Community Development Department which is applicable for such establishment, or to continue to operate an establishment where that person knows or has reason to know that the license of the establishment is under suspension, has been revoked or has lapsed. The operation of an adult entertainment establishment without a valid license, where required, shall be grounds for the closing of the establishment upon a finding of fact by a court or other body with proper jurisdiction that the establishment has no valid license.

(b) Adult entertainment licenses referred to in this Article shall be classified as follows:

(1) Adult bookstore

(2) Adult theater

(3) Adult performance establishment

(c) An adult entertainment license for a particular adult entertainment establishment shall be limited to one (1) classification of license.

Sec. 14-99. Issuance or denial.

(a) Generally.

(1) Upon the completion of the investigation and review of an application as required in this Division, upon determination that the applicant meets the requirements of this Division, and upon payment of the appropriate license fee by the applicant, the Community Development Department shall issue the license.

(2) If, after review and investigation as provided in this Division, the Community Development Department determines that one or more of the reasons for denial stated in Subsection (b) of this Section exist, the application shall be denied, and the Community Development Department shall make a written report of the denial and the reasons therefor. A copy of the report shall be sent by certified mail to the designated return address of the applicant on the application.

(b) Grounds for denial. The application for a license shall be denied if one or more of the following conditions are found to exist:

(1) The application does not comply with the requirements of this Article.

(2) The application contains material false information.

(3) The applicant or any of the individuals listed in Section 14-97(b)(1) has a license under this Division which has been suspended or revoked as a result of the implementation of Sec 14-77.

(4) The granting of the application would violate a statute or ordinance or an order from a court of law which effectively prohibits the applicant from obtaining an adult entertainment license.

(c) Judicial review. Any decision of the Community Development Department pursuant to Division 2 ("License") may be immediately reviewed as a matter of right by the circuit court upon the filing of an appropriate pleading by an aggrieved party.

Sec. 14-101. Time limit for action on application. The Community Development Department shall grant or deny all applications submitted hereunder within forty-five (45) days from the date that a completed application with application fee was submitted. Upon expiration of the 45th day, the applicant shall be permitted to begin operating the establishment for which a license is sought, unless and until the Community Development Department notifies the applicant of a denial of the application and states the reason(s) for that denial.

PART III. UNIFIED LAND DEVELOPMENT REGULATIONS

Chapter II

DISTRICT AND GENERAL REGULATIONS

ARTICLE VIII. NONCONFORMING USES AND NONCOMPLIANT STRUCTURES

Section 2-8.9. Abandonment or discontinuance of a nonconforming use. If a nonconforming use is removed or abandoned, or ceases for a continuous period of more than 90 consecutive days, any and every future use of the premises shall be in conformity with the use provisions of the land development regulations. All material and equipment associated with the abandoned or discontinued nonconforming use shall be completely removed from the premises by its owner within six months after the expiration of the 90-day period. No additional structure which does not conform to the requirements of this Article shall be erected in connection with such nonconforming use of land.

APPENDIX B

Order of the United States Court of Appeals for the Eleventh Circuit, denying Boss Capital's Petition for Rehearing, dated October 18, 1999

BOSS CAPITAL, INC.,
Plaintiff-Appellant,

v.

CITY OF CASSELBERRY
Defendant-Appellee.

No. 98-2802.

Before DUBINA and HULL, Circuit Judges, and O'KELLEY, Senior District Judge.

PER CURIAM

The petition(s) for rehearing filed by Boss Capital, Inc.

is DENIED

APPENDIX C

Unreported Opinion of the United States District for the Middle District of Florida, dated September 3, 1999

BOSS CAPITAL, INC.,

Plaintiff,

v.

CITY OF CASSELBERRY,

Defendant.

No. 96-463-CIV-ORL-22B

ANNE C. CONWAY, District Judge

ORDER

This cause comes before the Court for consideration of Defendant City of Casselberry's ("City") Motion for Summary Judgment (Doc. 59) and Plaintiff Boss Capital Inc.'s Motion for Summary Judgment (Doc. 61). Plaintiff challenges the constitutional validity and application of Sections 14-66, *et. seq.*, of the City's Code as originally adopted by Ordinance 717, as readopted by Ordinance 774, and as amended by Ordinance 96-864 (hereinafter collectively referred to as "Ordinance").

I. Standard for Summary Judgment

Summary judgment is appropriate only when the Court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In making this

determination, the Court must view all of the evidence in a light most favorable to the non-moving party. *Samples on Behalf* of *Samples v. Atlanta,* 846 F.2d 1328, 1330 (11th Cir. 1988) The moving party has the initial burden of establishing the absence of a genuine issue of fact. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). Next, the "non-moving party . . . bears the burden of coming forward with sufficient evidence of every element that he or she must prove." *Rollins v. Techsouth, Inc.,* 833 F.2d 1525, 1528 (11th Cir. 1987). To that end, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file', designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex,* 477 U.S. at 324.

II. Background Information

Plaintiff seeks to operate an adult entertainment business in the City of Casselberry. Prior to April 1996, Plaintiff initiated research in the area to locate an appropriate location for the business. In April 1996, Plaintiff entered into a lease for a building, which was previously operated as a bar. The land is located on commercially zoned property almost 1000 feet from residentially zoned property within the City. The City refused to permit Plaintiff to use the property for adult entertainment.

On May 1, 1996, Plaintiff filed suit in this Court against the City claiming that adult entertainment Ordinances 717 and 774 infringed its First Amendment rights. (Doc. 1). On June 17, 1996, the City adopted Ordinance 96-864, which amended the prior two ordinances. Thereafter, on November 20, 1996, Plaintiff filed an amended, eleven count complaint. (Doc. 21) The Court dismissed three counts in an order dated June 10, 1997. (Doc. 25) The remaining allegations are as

follows: (1) the Ordinance does not allow for the legitimate establishment of alternative avenues of communication (Count I); (2) there is improper predicate for the adoption of the Ordinance (Count II); (3) the Ordinance lacks adequate procedural safeguards and does not provide the necessary constitutionally prompt review and thus results in an unconstitutional prior restraint (Count III); (4) the Ordinance is unconstitutionally overbroad (Count VII); (5) Ordinance 717 was improperly enacted (Count VIII); (6) Ordinance 774 was improperly enacted (Count IX); and (7) Ordinance 96-864 was improperly enacted (Count X).

The parties have filed cross motions for summary judgment. Defendant seeks summary judgment on Counts I, II, III, VII, VIII, IX, X, and on lost profit damages. Plaintiff seeks summary judgment on Counts I, VIII, IX, and X.

III. Alternative Avenues of Communication (Count I)

Plaintiff alleges in Count I of the Amended Complaint that the zoning requirements in the Ordinance preclude adult entertainment clubs from engaging in business within the City of Casselberry. The Ordinance limits all adult entertainment establishments within the City to a C-G (Commercial-General) zoning district. Ordinance 96-864, Section II. In addition, the Ordinance provides in relevant part that:

> No person shall cause or permit the establishment, substantial enlargement, or transfer of ownership or control of an adult entertainment establishment within one thousand (1,000) feet of any other adult entertainment establishment, any church, school, public park, or public recreation area, or within one thousand (1000) feet of an area zoned for residential use

> and/or designated by an adopted Comprehensive Plan in a manner primarily intended for dwellings.
>
> For the purpose of this Ordinance, distance measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest property line of the property used as an adult entertainment establishment to the nearest property line of the premises of a church, school, public park, or public recreation areas, or to the nearest boundary of any area legally zoned and/or designated by Comprehensive Plan in a manner primarily intended for dwellings without regard to municipal boundaries. Measurement of distances between adult entertainment establishments shall be from lot line to lot line at their nearest points.

Ordinance No. 717, Sections VIII and IX.

In its Motion for Summary Judgment, the City argues ample alternative avenues for communication exist because three licensed adult businesses are located within the City and two other potential sites are available. Defendant's Motion for Summary Judgment (Doc. GO) at 2-3. Additionally, the City contends that three adult clubs exist immediately outside the City's boundaries. *Id.* at 3-4. In its Motion, Plaintiff argues that the City has precluded all adult entertainment establishments within the City due to the zoning requirements, set back requirements of 1000 feet from every residentially zoned area, and unavailability of potential sites. Plaintiff's Motion for Summary Judgment (Doc. 61) at 6-7.

Content-neutral time, place, and manner regulations survive constitutional scrutiny as long as they do not unreasonably limit alternative avenues of communication. *City* of *Renton v. Playtime Theaters, Inc.*, 47S U.S. 41, 47 (1986). Courts have not established a bright line rule for determining the reasonableness of an ordinance. However, it is clear from the case law that a site need not be actually available. As the Supreme Court stated in *Renton*, adult entertainment establishments

> must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees . . . . [A]lthough we have cautioned against the enactment of zoning regulations that have 'the effect of suppressing, or greatly restricting access to, lawful speech,' we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices . . . . In our view the First Amendment requires only that (the government) refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city . . . .

Renton, 475 U.S. at 54.

The Court in *Centerfold Club, Inc. v. City of St. Petersburg*, 969 F. Supp. 1288, 1302 (M.D. Fla. 1997), discussed the issue of determining the relevant real estate market. In that case, the Court explained that "[w]hether a relocation site is available and part of the relevant real estate market is measured in terms of 'genuine possibility.'" *Id.* The Court then noted several factors to consider when determining

whether a potential site is available. First, physical considerations may render a site unavailable. *Id.* In particular, "[a] site is not a genuine possibility when it is 'under the ocean, airstrips of international airports, sports stadiums, areas not readily accessible to the public, areas developed in a manner unsuitable for any generic commercial business, areas lacking in proper infrastructure, and so on.'" *Id.* (quoting *Woodall v. City of El Paso,* 49 F.3d 1120, 1124 (5th Cir. 1995), *cert. denied,* 516 U.S. 988 (1995)). Second, economic considerations may render a site unavailable. *Id.* As the Court explained, this occurs when it is "'unreasonable to believe that it would ever become available to any commercial enterprise.'" *Id.* (quoting *Topanga Press, Inc. v. City of Los Angeles,* 989 F.2d 1524, 1531 (9th Cir. 1993), *cert.* denied, 511 U.S. 1030 (1994)). However, "when a site is part of the relevant market and available to any commercial enterprise, it is irrelevant whether or not the owner will lease the land to the adult establishment." *Id.* (citations omitted) . Third, leases or restrictive covenants between third parties do not render a site unavailable. *Id.* Fourth, "hazardous waste or other factors which render the land more expensive to purchase or lease are also irrelevant." *Id.*

After a court determines the relevant market, it then decides whether the number of sites is reasonable. There is no requirement for how many sites are necessary or what percentage of land must be available. *Id.* at 1303 (citing *3570 East Foothill Blvd., Inc. v. City of Pasadena,* 912 F. Supp. 1257, 1265 (C.D. Cal. 1995), *aff'd,* 99 F.3d 1147 (9th Cir. 1996)). Courts have considered various factors, including "'the percentage of land theoretically available to adult businesses, the number of sites potentially available in relation to the population of the city, the number of sites compared with the existing number of adult businesses, or the number of businesses desiring to offer adult entertainment.'"

Id. (quoting *3570 East Foothill Blvd., Inc.*, 912 F. Supp. at 1265).

Turning to the instant case, this Court must first determine the relevant market. As to the three existing adult entertainment establishments, under the Ordinance, they are grandfathered as nonconforming uses. The Ordinance provides that the set back requirements do not apply to "adult performance establishments formerly defined as adult cabarets existing and operating in Casselberry on February 17, 1992, the effective date of the ordinance from which this Article is derived; provided that any new construction shall be subject to such requirements, regardless of whether the establishment was in existence and operating on such effective date." Ordinance 96-864, Section X. If any of three nonconforming establishments were to close, 5 2-8.9 of the Unified Land Development Regulations would govern. This section provides in pertinent part:

> If a nonconforming use is removed or abandoned, or ceases for a continuous period of more than 90 consecutive days, any and every future use of the premises shall be in conformity with the use provisions of the land development regulations.

Unified Land Development Regulations 5 2-8.9. A nonconforming use is defined as:

> A use of a building or structure or a tract of land which does not, on the effective date of this ordinance or amendment thereto, conform to any one of the current permitted uses or the district in which it is located . . . .

Id. § 2-8.2. Therefore, the closure of any of these businesses might reduce the number of adult clubs in the City.[1] However, according to the Unified Land Development Regulations, another adult club could operate a business in the same location as long as it commences its business within 90 days.

The proper inquiry is whether the zoning Ordinance leaves current and future adult businesses with sufficient opportunities to open and operate. *3570 East Foothill Blvd., Inc. v. City of Pasadena,* 980 F. Supp. 329, 343 n.18 (C.D. Cal. 1997) (citing *Lakeland Lounge v. City of Jackson,* 973 F.2d 1255, 1260 (5th Cir. 1992) . *cert. denied,* 507 U.S. 1030 (1993) (determining reasonableness of sites based on existing adult businesses)). The Ordinance is prospective in nature by allowing existing businesses to continue their use and by permitting new businesses to continue the nonconforming use as long as the use begins within 90 days. Therefore, the Court will consider the three existing uses as part of the relevant market. See *Young v. American Mini Theaters, Inc.,* 427 U.S. 50, 71 n.35 (1976) (upholding adult business zoning ordinances in part because the "Ordinances do not affect the operation of existing establishments but only the location of new ones'"); *International Food & Beverage Systems v. City of Fort Lauderdale,* 794 F.2d 1520, 1526 (11th Cir. 1986) (including potential and existing sites when discussing the issue of alternative avenues); *Walnut Properties, Inc. v. City of Whittier,* 861 F.2d 1102, 1109-10 (9th Cir. 1988) (finding that the ordinance violated the First Amendment because it would force the only existing theater to close with no place to relocate), *cert. denied,* 490 U.S. 1006 (1989).

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1. However, the property identified by McLaughlin as meeting the 1000 foot set back requirement but not the 1000 foot requirement from another adult establishment would be able to support an adult club should the nonconforming use club close.

As to the clubs existing outside the City limits, the Court finds that under the facts of this case, they are properly included as part of the relevant real estate market. The Supreme Court in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), considered an ordinance that excluded all live entertainment, including nonobscene nude dancing. In support of the exclusion, the borough argued that "live entertainment in general and nude dancing in particular are amply available in close-by areas outside the limits of the Borough." *Id.* at 76. The Court rejected this argument reasoning that:

> [The Borough's] position suggests the argument that if there were countywide zoning, it would be quite legal to allow live entertainment in only selected areas of the county and to exclude it from primarily residential communities . . . . This may very well be true, but the Borough cannot avail itself of that argument in this case. There is no countywide zoning . . . . Furthermore, there is no evidence in this record to support the proposition that the kind of entertainment appellants wish to provide is available in reasonably nearby areas. The courts below made no such findings; and at least in their absence, the ordinance excluding live entertainment from the commercial zone cannot constitutionally be applied to appellants . . . .

Id.

Unlike the situation in *Schad* where there was no evidence of adult entertainment clubs in surrounding areas, in the instant case, there is evidence in the record of three adult clubs located in the surrounding county. In fact, the clubs are immediately outside the city limits of Casselberry. One is located approximately 978 feet south; another is located

approximately 121 feet south; and the third is located approximately 1.25 miles south. Defendant's Motion for Summary Judgment (Doc. 60), Exhibit 1. Based on the proximity of the clubs to the City, the Court finds that the clubs are to be considered when determining the relevant market.

Regarding the two potential sites for adult entertainment, the parties have submitted affidavits and depositions of expert witnesses Richard Wells for the City and Robert McLaughlin for the Plaintiff. Wells states in his affidavit that the first site is "located approximately in the center of a large parcel at the eastern terminus of Seminola Boulevard. The second area is located at the intersection of Oxford Road and State Road 436." Defendant's Motion for Summary Judgment (Doc. 60), Exhibit 1. McLaughlin in his affidavit states that there are potentially two sites that meet the 1000 foot set back requirement from residentially zoned areas. Plaintiff's Motion for Summary Judgment (Doc. 61), Exhibit A. One is in the southwest corner of the City. McLaughlin contends that the site is not available because it is within 1000 feet of another adult entertainment establishment. *Id.* The other is the northeast part of Seminole Greyhound Park, the area described by Wells as the eastern terminus of Seminola Boulevard. *Id.* McLaughlin states that this site is not available because it is within 1000 feet of a residentially zoned district if measured from property line to property line as required by the Ordinance. *Id.* In addition, he argues that the area has no infrastructure, there is no access to it, and it is occupied by a permanent occupancy unlikely to relocate. *Id.* Lastly, McLaughlin argues that the area identified by Wells at Oxford Road and State Road 436 does not meet the set back requirements and is precluded by legal impediments, such as master leases or restrictive easements. Plaintiff's Opposition (Doc. 65), Exhibit 1, at 7.

Although there is some dispute between the parties as to the availability of the potential sites, the Court does not need to address whether these sites are actually available. Even if only six sites are available (three existing sites and three sites in the surrounding area), the Court holds that the Ordinance does not unreasonably limit alternative avenues of communication. Similar ordinances from other counties and cities in Florida have been upheld. For example, the Eleventh Circuit in *International Food* held that 22 sites left reasonable alternatives. *International Food,* 794 F.2d at 1520. Fort Lauderdale, at the time of the case, had a population of approximately 156,000, creating a ratio of 1 site per 7,090 persons. Similarly, the City of Boynton Beach's ordinance was found to be constitutional where it had 11 sites available. *Southern Entertainment Co. of Fla., Inc. v. City of Boynton Beach*, 736 F. Supp. 1094 (S.D. Fla. 1990). Based on a population of approximately 45,000, the ordinance allowed 1 site per 4,090 persons.

In the instant case, a minimum of 6 available sites exists for a population of approximately 24,100 in an area of 8 square miles; Therefore, 1 site is available for 4,016 persons. Given the size and population of the City, the number of available sites in this case is reasonable. See *Centerfold Club,* 969 F. Supp. at 1306 (holding that St. Petersburg's ratio is inadequate with one site per 12,56S persons). Therefore, summary judgment is due to be granted in favor of Defendant.

IV. Improper Predicate for the Adoption of Ordinance (Count II)

In the Amended Complaint, Plaintiff contends that the Ordinance was adopted without substantial competent evidence and, therefore, lacks proper predicate. Plaintiff's

First Amended Complaint (Doc. 21) ¶ 46.

A city's interest in protecting the quality of urban life from the secondary effects of adult businesses is indeed substantial. *International Eateries of America, Inc. v. Broward County,* 941 F.2d 1157, 1162 (11th Cir. 1991), *cert. denied,* 503 U.S. 920 (1992). The government interest at stake must be gleaned from the ordinance itself. *Id.* at 1162 n.3. In *International Eateries,* the Eleventh Circuit held that the distance restrictions, specific statements that certain businesses have a "deleterious effect" on businesses around them, and the defined purpose of the ordinance as "ensuring that these adverse effects will not contribute to the blighting and downgrading of the surrounding neighborhood," created a substantial government interest. *Id.* at 1162.

Similarly, the Ordinance in the instant case contains a "Findings of Fact" section which establishes a distance restriction (§ 14-75); addresses the deleterious effect to urban neighborhoods (§ 14-69(4) of prostitution, pandering, solicitation, lewd and lascivious behavior, etc.), and foretells the blighting and adverse effects on neighboring businesses (§ 14-69(5)). The Court previously found in its Order dated June 10, 1997 (Doc. 25), that this Ordinance is aimed at the same type of harm found to create a substantial government interest in *Renton* and *International Eateries.* (Doc. 25).

However, such findings of fact alone are not sufficient. "The enacting body must have a reasonable basis for its belief that the harm to be protected against in fact exists." *International Eateries,* 941 F.2d 1157, 1162 (11th Cir. 1991) (citing *Renton,* 475 U..S. at 50). However, a city does not need to perform its own studies. *Id.* According to the Court in *Renton,*

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

Renton, 475 U.S. at 51-52.

In the instant case, within the "Findings of Fact" section, the City states that it is relying on the findings incorporated in Orange County, Florida's adult entertainment code and the findings and declarations as stated in Seminole County, Florida's adult entertainment code. The Court previously noted that the findings of fact in these codes are relevant to the City of Casselberry because Casselberry is in Seminole County and borders Orange County. (Doc. 25). The Court did not dismiss the claim, however, because the findings of those codes were not submitted to the Court at the time of its prior Order. *Id.* As a result, the Court could not determine whether those findings further a substantial governmental interest. Along with its Motion for Summary Judgment, Defendant attached both codes. (Doc. 60, Exhibits 15, 16)

Pursuant to Section 1A-16 of the Orange County Ordinance, the findings of facts are based on:

> evidence and testimony presented at public hearings before the Board of County Commissioners of Orange County, Florida, and on the findings incorporated in the United States Attorney General's Commission on Pornography

> (1986), Jacksonville Municipal Code, Chapter 410, Ord. 77-257-256, 5 1, the Los Angeles Municipal Code, § 12.70, Ord. 156509 (1982), the Detroit Zoning Ordinance, 66,000, Ord. 742-G, S 1, 10-24-82, and "A Summary of a National Survey of Real Estate Appraisers Regarding the Effect of Adult Bookstores on Property Values," conducted by the Division of Planning, Department of Metropolitan Development, Indianapolis, January 1984 . . . .

The Board of County Commissioners stated that it enacted the Seminole County code based on the following:

> in response to the concerns of the Sheriff of Seminole County and numerous residents of Seminole County, have, through public hearing, heard interested parties and citizens for and against the purposes of this Ordinance and have reviewed the findings incorporated in "Adult Entertainment Businesses In Indianapolis, An Analysis" prepared by the Division of Planning, Department of Metropolitan Development, Indianapolis, Indiana, February 1984, which includes a summary of a national survey of real estate appraisers regarding the effects of adult bookstores on property values; "Report on Adult Oriented Businesses in Austin" prepared by the Office of Land Development Services, City of Austin, Texas, May 19, 1986; and the Orange

County, Florida Adult Entertainment Code, 1987.

The findings of fact of these codes outline the various findings made by the county concerning the adverse secondary effects which tend to accompany adult entertainment. For example, the findings state that adult activities: (1) lead to other activities, which are illegal, immoral, or unhealthful, such as prostitution, pandering, solicitation for prostitution, lewd and lascivious behavior, exposing minors to harmful material, possession, distribution and transportation of obscene materials, sale or possession of controlled substances, and violent crimes against persons, and property; and (2) attract an undesirable number of transients, blight neighborhoods, lower property values, promote crime, and lead residents and businesses to move to other locations.

After reviewing the findings of fact of the Orange and Seminole County's codes, the Court finds that those findings further a substantial government interest. Therefore, the City of Casselberry was entitled to rely on these codes and had a reasonable belief that the secondary effects of adult businesses exist.

In its response, Plaintiff argues that the record of the adoption of the Ordinance contains no evidence whatsoever to support the need for the Ordinances," and that the City must present substantial competent evidence of the need for the Ordinance. Plaintiff's Opposition (Doc. 65) at 11. The Court rejects these arguments. A city is not required to conduct new studies or produce evidence independent of that already generated by other cities, so long as the evidence the city relies on is reasonably believed to be relevant to the problem. *Ren ton,* 475 U.S. at 51-52. Therefore, because the Court concludes that the evidence relied upon is reasonably believed

to be relevant to the problem caused by adult businesses, summary judgment is due to be granted in Defendant's favor as to this issue.

V. Prompt Judicial Review (Count III)

Plaintiff alleges that the Ordinance's licensing scheme is facially invalid because it does not provide for prompt judicial review. The judicial review section, § 14-99 of the Ordinance provides:

> (c) Judicial Review. Any decision of the Community Development Department, pursuant to Division 2 (License) may be immediately reviewed as a matter of right by the Circuit Court upon the filing of an appropriate pleading by an aggrieved party.

In its Motion for Summary Judgment, Defendant argues that this provision on judicial review is sufficient to withstand constitutional scrutiny. For support, Defendant urges the Court to apply its ruling in *Florida Video Xpress, Inc. v. Orange County, Florida*, 983 F. Supp. 1091 (M.D. Fla. 1997).

In *Florida Video Xpress*, this Court considered the issue of whether Orange County's adult entertainment code provided for prompt judicial review. *Id.* at 1096 (citing *Redner v. Dean*, 29 F.3d 1495, 1501 (11th Cir. 1994)). That code provided that "[a]ny decision of the tax collector . . . may be immediately reviewed as a matter of right by the circuit court upon the filing of an appropriate pleading by an aggrieved party." *Id.* at 1098. Plaintiffs in that case argued that the code provided for prompt judicial filing, not prompt

judicial review. *Id.* Additionally, they asserted that in order to survive constitutional scrutiny, the code must provide for actual review by a court within a period of time. *Id.* This Court rejected the plaintiffs' arguments and found that:

> [t]his provision provides for prompt judicial review within the meaning of *Freedman*, *FW/PBS*, and *Redner*. The Code requires no further exhaustion of administrative remedies after the tax collector decides. Orange County need not, and could not mandate the manner or time within which the judiciary must review, an adverse decision by the tax collector.

Id. at 1098.

Like the code in *Florida Video Xpress*, the Ordinance in the instant case explicitly provides for judicial review as a matter of right to the circuit court upon the denial of an application. Therefore, the Court finds that the Ordinance provides for prompt judicial review.

Plaintiff argues that *Florida Video Xpress* was incorrectly decided and urges the Court to reexamine the issue of prompt judicial review and find that the law mandates prompt judicial resolution. Plaintiff contends that the court system does not provide for prompt judicial resolution because "[ijf, as is the case in Florida Circuit Courts, a court has the ability and the discretion to create a delay in reaching a prompt judicial resolution by setting leisurely hearing, briefing, and argument schedules, such procedural flexibility provides absolutely no procedural safeguard . . . ." Plaintiff's Opposition (Doc. 65) at 15. However, this Court previously

considered and rejected these arguments in *Florida Video Xpress*. It is unwilling to reconsider its prior ruling. Accordingly, summary judgment in favor of Defendant is appropriate as to this matter.

VII. Proper Enactment of Ordinances 717 and 774 (Counts VIII and IX)

Plaintiff alleges in Counts VIII and IX that Ordinances 717 and 774 were improperly enacted and, therefore, are null and void. Specifically, Plaintiff contends that Ordinances 717 and 774 violate §§ 166.041(3)(c) and 163.3194, Florida Statutes. Amendment Complaint (Doc. 21) at ¶¶ 95-96 and 100-101. Plaintiff also argues that Ordinance 774 is an unconstitutional multi-subject Ordinance, in violation of § 166.041(2), Florida Statutes. *Id.* at ¶ 102.

Section 166.041 (3) (c), Florida Statutes, sets forth the notice and public hearing requirements for the adoption of an ordinance which rezones specific parcels of private real property or which substantially changes permitted uses in a particular zoning district. Defendant argues in its Motion for Summary Judgment, however, that this section does not apply to Ordinances 717 and 774 due to H.B. No. 2055, Chapter 95-310, § 6, which mandates that in enacting these Ordinances, the City had to follow only § 166.041(2), not § 166.041(3) (c)

H.B. No. 2055, Chapter 95-310, § 6 provides in relevant part:

> If any ordinance or resolution was adopted prior to the effective date of this act and the appropriate subsection of 5 166.041, Fla. Stat. was not followed, but the municipality followed the procedure

> of subsection (2) or subsection (3) of § 166.041, Fla. Stat. as they existed at the time of the adoption of such ordinance or resolution, the procedures used for such ordinance or resolution are hereby validated and ratified.

This chapter went into effect on June 15, 1995.

Ordinances 717 and 774 were adopted on February 17, 1992 and September 13, 1993, respectively. Because the Ordinances were adopted prior to June 15, 1995, they had to comply with only § 166.041(2).

Plaintiff argues that Chapter 95-310 denies Plaintiff due process and is, therefore, unconstitutional under the Fifth and Fourteenth Amendments. Plaintiff's Motion for Summary Judgment (Doc. 61) at 18. In particular, Plaintiff contends that the Chapter imposes a statute of limitations that prevents challenges to zoning ordinances. *Id.* at 16.

To determine whether Plaintiff was denied procedural due process in the enactment of the Ordinances, the relevant inquiry is whether Plaintiff has a liberty or property interest that was interfered with by the state and whether the state used constitutional sufficient procedures in interfering with that interest. *First Assembly of God of Naples, Florida, Inc. v. Collier County,* 775 F. Supp. 383, 388 (M.D. Fla. 1991) (citing *Kentucky Dept. of Corrections* v. *Thompson,* 490 U.S. 454 (1989)). The initial determination of whether Plaintiff has a protectable property interest is governed by state law. *Id.* Under Florida law, procedural due process attaches to zoning actions which alter the manner in which a property owner can use the land. *First Assembly of God of Naples, Florida, Inc. v. Collier County,* 20 F.3d 419, 422 (11th Cir. 1994), *cert.*

denied, 513 U.S. 1080 (1995). Because Plaintiff was denied a permit to use the land for an adult club, Plaintiff has met the first prong of the test.

Under the second prong of the test, due process requires that persons deprived of a right must be afforded notice and an opportunity to be heard. *Id.* (citing *Zinermon* v. *Burch,* 494 U.S. 113 (1990)). Plaintiff does not argue that notice was not provided or that it was not given an opportunity to be heard, but that there was only one public hearing, it was not advertised in a newspaper of general circulation in the City, the advertisement was placed with the legal and classified advertisements, and it was not proper in form and context.

Public notification of Ordinance 717 appeared in a local newspaper on February 2, 1992. Defendant's Opposition (Doc. 63), Exhibit 9. In addition, Ordinance 717 was read at two Commission hearings on February 3, 1992 and February 17, 1992. *Id.,* Exhibit 5. Further, this Ordinance was the subject of two public hearings also held on those dates. *Id.,* Exhibits 7 and 8.

Public notification of Ordinance 774 appeared in the Orlando Sentinel on August 29, 1993. *Id.,* Exhibit 11. The Ordinance was read on August 16, 1993 and on September 13, 1993. *Id.,* Exhibit 6. Finally, the Ordinance was the subject of two public hearings held on August 16, 1993 and September 13, 1993. Therefore, because Plaintiff was afforded notice of the Ordinances and an opportunity to be heard at the public meetings, the Court finds that Plaintiff's due process rights were not violated.

In its Motion for Summary Judgment, Plaintiff contends that the notice and hearing requirements of §

166.041(3), Fla. Stat., constitute a fundamental due process right. The Court disagrees. As the Eleventh Circuit stated in *First Assembly,* 20 F.3d at 422:

> Even if the notice in this case is insufficient to satisfy the state statute, the state statute does not define the process due under the federal Constitution. Therefore, even if the state statute has been violated, that does not prove a violation of a federal constitutional right . . . . [W]e emphasize that the violation of a state statute outlining procedure does not necessarily equate to a due process violation under the federal Constitution. If otherwise, federal courts would have the task of insuring strict compliance with the state procedure regulations and statutes.

Id. (quoting *Harris* v. *Birmingham Board of Education,* 817 F.2d 1525, 1527-28 (11th Cir. 1987)). Therefore, even if the City failed to follow the state procedures, no federal constitutional right has been infringed.

Because Plaintiff cannot establish a procedural due process claim, the City had to satisfy only § 166.041(2) to meet the statutory requirements. That subsection provides:

> Each ordinance or resolution shall be introduced in writing and shall embrace but one subject and matters properly connected therewith. The subject shall be clearly stated in the title. No ordinance shall be revised or amended by reference to its title only. Ordinances to revise or

> amend shall set out in full the revised or amended act or section or subsection or paragraph of a section or subsection.

§ 166.041(2), Fla. Stat.

Plaintiff attacks Ordinance 774 by arguing that it is an unconstitutional multi-subject Ordinance[2] because it addresses many subjects, such as handbills, alcoholic

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2. Ordinance 774 provides in relevant part:

SECTION I: The Code entitled "Code of Ordinances, City of Casselberry, Florida," published by Municipal Code Corporation consisting of Chapters 1 through 94, each inclusive, is adopted.
SECTION II: All Ordinances of a general and permanent nature enacted on or before March 1, 1993, and not included in this Code or recognized and continued in force by reference therein, are repealed . . .
SECTION IV: Unless another penalty is expressly provided, every person convicted of a violation of any provision of the Code or any Ordinance, Resolution, order, rule, or regulation adopted or issued in pursuance thereof, shall be punished by a fine not exceeding Five Hundred Dollars ($500.00), or imprisonment for a term not exceeding sixty (60) days, or both a fine and imprisonment. Each act of violation and each day upon which any such violation shall occur shall constitute a separate offense. The penalty provided by this Section, unless another penalty is expressly provided, shall apply to the amendment of any Code Section whether or not such penalty is reenacted in the amendatory Ordinance. In addition, to the penalty prescribed above, the City may pursue other remedies, such as abatement of nuisances, injunctive relief, and revocation of licenses or permits . . . .

beverages, amusements, adult entertainment, animals, businesses, emergency management, fire protection, floods, personnel, solid waste, traffic and vehicles, and utilities. In its Motion, Defendant contends that the Ordinance addresses only one subject matter – the enactment of a new City Code for the city of Casselberry. The Court finds Plaintiff's argument to be without merit. The Ordinance merely adopts and enacts Chapters 1 through 94 of the City of Casselberry's Code. It does not discuss multiple subjects. Thus, Ordinance 774 was properly enacted. Plaintiff does not claim that Ordinance 717 failed to satisfy this statutory requirement.

In the Amended Complaint, Plaintiff also alleges that Ordinances 717 and 774 are void ab initio because they were not referred to a Land Planning Agency for review and a determination of consistency pursuant to § 163.3194, Fla. Stat. In its Motion, Defendant submits exhibits demonstrating that Ordinance 717 was referred to the Land Planning Agency, but Ordinance 774 did not have to be referred to the agency because it is not a land development regulation, but rather an ordinance enacting the City's Code. Plaintiff does not contest Defendant's arguments in its response. Accordingly, summary judgment is appropriate as to this issue.

Lastly, Plaintiff asserts that Ordinance 774 is unconstitutional because it "represents an unlawful delegation of legislative authority to Municipal Code Corporation." Plaintiff's Motion (Doc. 61) at 8-9. Defendant argues that no unlawful delegation occurred because the Code demonstrates that the City itself adopted the Code of Ordinances and that the Code was merely published by Municipal Code Corporation. Defendant's Memorandum (Doc. 60) at 9. Plaintiff does not offer any response to Defendant's position and fails to support the argument with legal authority.

Therefore, the Court rejects Plaintiff's claim. Accordingly, because the Ordinances were properly enacted, summary judgment is due to be granted in favor of Defendant.

VIII. Proper Enactment of Ordinance 96-864 (Count X)

In the Amended Complaint, Plaintiff claims that Ordinance 96-864 should be null and void because it was not enacted in accordance with § 166.041(3) (c), was not reviewed by the Land Planning Agency for the City, and is a multi-subject ordinance.

Subsection (3)(c), as enacted on June 15, 1995 provides in pertinent part:

> Ordinances that change the actual list of permitted, conditional or prohibited uses within a zoning category, or ordinances initiated by the municipality that change the actual zoning map designation of a parcel or parcels of land shall be enacted pursuant to the following procedure . . . .

§ 166.041(3)(c). In its Motion for Summary Judgment, Defendant initially argues that Ordinance 96-864 did not change the zoning designation of any parcel of land in the City and did not change the list of permitted, conditional, or prohibited uses within any zoning district. Rather, the Unified Land Development Regulations ("Regulations"), which were adopted on March 1, 1993, divided the City into zoning districts and established boundaries. When the Regulations were adopted, Defendant asserts that the zoning of the property which is the subject of this lawsuit was changed from zone C-1. to zone CG. Therefore, Defendant contends that Ordinance 96-864 merely reflected the change that

occurred in 1993 and was not a land-use ordinance. As a result, Defendant claims that the Ordinance did not have to comply with § 166.041(3)(c)

Ordinance 96-864 amended Ordinance 717. Ordinance 717 specifically permitted adult uses in the C-1 Zoning District. Ordinance 757, adopted on March 1, 1993, abolished the C-1 Zoning District and adopted the Unified Land Development Regulations. Since the adoption of the Regulations, the City argues that adult uses have been permitted as an "amusement (enclosed)" in the CG zoning district. *See* Affidavit of Wells, Exhibit B, at 2:17. Although the term "amusement (enclosed)" is not specifically defined in the Regulations, the chapter in the City's Code that addresses adult entertainment establishments is titled "Amusements." From this, it is clear that the reference to "amusements" in the Regulations includes adult entertainment establishments. Therefore, because the change in zoning classifications occurred when the Regulations were adopted, the Court finds that Ordinance 96-864 merely reflects the previous change from C-1 to C-G.

Because the Ordinance is not a zoning ordinance, it must be enacted in accordance with § 166.041(3)(a). That subsection provides:

> Except as provided in paragraph (c), a proposed ordinance may be read by title, or in full, on at least two separate days and shall, at least ten days prior to adoption, be noticed once in a newspaper of general circulation in the municipality. The Notice of Proposed Enactment shall state the date, time and place of the meeting; the title or titles of the proposed

> ordinance; and the place or places within the municipality where such proposed ordinances may be inspected by the public. The notice shall also advise that interested parties may appear at the meeting and be heard with respect to the proposed ordinance.

Ordinance 96-864 was adopted on June 17, 1996. Defendant's Opposition (Doc. 63), Exhibit 14. The title was read twice on June 3, 1996 and June 17, 1996. *Id.* at Exhibits 14-16. The Ordinance was advertised May 26, 1996, June 2, 1996, and June 9, 1996 in the Orlando Sentinel, a newspaper of general circulation. *Id.,* Exhibit 17. The three advertisements are identical except that the first two contain typographical errors. Rather than referencing "CG," the May 26, 1996 advertisement referenced "C-6" and the June 2, 1996 advertisement referenced "C-O." However, each advertisement made two references to "Commercial General" as the zoning classification. The notices also stated the date, time, place of the meeting, title, and place within the municipality where the Ordinance can be inspected. *Id.* at Exhibit 17.

Plaintiff argues that the typographical errors are significant and should render the Ordinance void. However, the Court finds that the errors are minor, especially since the zoning classification was spelled out completely in the title and in the legend of the map attached. Accordingly, the notices met the requirements of S 166.041(3) (a)

In its Motion for Summary Judgment, Defendant also argues that Ordinance 96-864 was not required to be reviewed by the Land Planning Agency since it did not change the zoning classification. As previously determined, the

Ordinance did not change the zoning classification, but merely reflected a change that occurred when the Regulations were adopted. Therefore, the City did not need to have the Ordinance reviewed by the Land Planning Agency. Lastly, Defendant argues that the Ordinance does not violate the prohibition against multi-subject ordinances. Plaintiff does not contest this issue. Accordingly, because Ordinance 96-864 was properly enacted, summary judgment is due to be granted in favor of Defendant as to this issue.

IX. Overbroad (Count VII)

In the Amended Complaint, Plaintiff alleges that the provisions of the challenged legislation are substantially overbroad. Defendant asserts in its Motion for Summary Judgment that the Ordinance is not overbroad because it is aimed at combating the adverse secondary effects of adult entertainment establishments. Plaintiff fails to present facts or argument in response. Therefore, summary judgment is due to be granted in favor of Defendant as to this issue.

X. Damages

Finally, Defendant argues that Plaintiff did not specifically state any special damages in the nature of lost profits in the Amended Complaint. Because Defendant's Motion for Summary Judgment is otherwise due to be granted, there is no need for the Court to address this issue.

XI. Conclusion

Based on the foregoing, it is ORDERED as follows:

1. Defendant's Motion for Summary Judgment (Doc. 59), filed February 9, 1998, is GRANTED.

2. Plaintiff's Motion for Summary Judgment (Doc. 61), filed February 9, 1998 is DENIED.

3. This case is removed from the May 1998 trial calendar.

4. The clerk shall enter final judgment for Defendant providing that Plaintiff shall take nothing on its claims against Defendant and that Defendant shall recover costs.

5. The clerk shall close this case.

6. All pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers, Orlando, Florida, this 11th day of May, 1998.

Anne C. Conway
United States District Judge

FILED
FEB 9 - 2000
CLERK

(2)

No. 99-1211

In the

Supreme Court of the United States

BOSS CAPITAL, INC,

Petitioner,

vs.

CITY OF CASSELBERRY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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In the

Supreme Court of the United States
October Term, 1999

BOSS CAPITAL, INC.

Petitioner,

vs.

CITY OF CASSELBERRY,

Respondent.

Pursuant to Rule 15.8, Rules of the Supreme Court of the United States, Petitioner Boss Capital, Inc. files this Supplemental Brief to call the Court's attention to a new circuit court decision in conflict with several circuit court decisions on the issue of the meaning of prompt judicial review.

In its Petition for Writ of Certiorari, Boss Capital urged this Court to grant the Writ to resolve a growing conflict among the federal circuit courts over the requirement that an ordinance imposing a prior restraint must provide for prompt judicial review. As a new decision of the United States Court of Appeals for the Sixth Circuit shows, that conflict can only be resolved by this Court.

ARGUMENT

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court held that whenever the government imposes a prior restraint on free speech, the restraint must include three procedural safeguards, to eliminate the risk that the restraint will become a tool of the censor:

> In *Freedman*, we determined that the following three procedural safeguards were necessary to ensure expeditious decisionmaking by the motion picture censorship board: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *Freedman, supra*, at 58-60.
>
> *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990)

In its Petition, Boss Capital argued that there is a significant conflict among the circuit courts as to the meaning of the term "prompt judicial review."[1] That conflict may have

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1. As the Ninth Circuit succinctly put it, in *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 11-14-15 (9th Cir. 1999): "There is some confusion associated with the meaning of the second *FW/PBS* safeguard, prompt judicial review, and this confusion has resulted in a split in the circuits."

had its genesis in the Seventh Circuit's decision in *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993)(en banc), *cert. denied*, 511 U.S. 1085 (1984).[2] But regardless of its source, the conflict grows daily, with the circuits so badly divided that only a resolution by this Court can resolve this matter of grave constitutional importance.

The First, Fifth, Seventh and Eleventh Circuits (and, arguably, the Second Circuit) have held that mere access to a judicial forum following the denial of a license is sufficient to comply with *Freedman's* requirement that any prior restraint must include a provision for prompt judicial review of the licensing authority's denial. *Jews for Jesus, Inc. v. Mass. Bay Trans. Authority*, 984 F.2d 1319 (1st Cir. 1993); *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994); *Graff v. City of Chicago, supra*; *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999); *Beal v. Stern*, 184 F.3d 117 (2nd Cir. 1999).[3]

A second group of decisions, from the Fourth, Sixth and Ninth Circuits, holds that mere access to a judicial forum is insufficient. Those courts require a prompt judicial determination. *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988 (4th Cir. 1995)(en banc), *cert. denied*, 516

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2. Interestingly, there is a great division of opinion as to what *Graff* held – if anything – on the subject of prompt judicial review. *Compare, e.g., 1126 Baltimore Blvd.*, 58 F.3d 988 (4th Cir. 1995), *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998) and *Special Souvenirs, Inc. v. Town of Wayne*, 56 F. Supp. 2d 1062 (E.D. Wis. 1999).

3. The Second Circuit panel in *Beal* indicated in dictum that prompt judicial access might be sufficient. However, that was not a holding of the case.

U.S. 1010 (1995); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998).

A new decision of the United States Court of Appeals for the Sixth Circuit shows clearly why this Court must grant Boss Capital's Petition. In *Nightclubs, Inc. v. City of Paducah*, ___ F.3d ___ (6th Cir., Case No. 98-6581, February 2, 2000), the Sixth Circuit reviewed the denial of a preliminary injunction against enforcement of the adult entertainment business licensing ordinance of the City of Paducah, Kentucky. The trial court had ruled that the ordinance included the required procedural safeguards.

The Sixth Circuit considered only one issue: "The sole issue raised on appeal is whether Paducah's licensing scheme, on its face, contains adequate procedural safeguards as required by the First Amendment."[4] In a divided opinion, the panel determined that the ordinance was unconstitutional, in part because it merely provided prompt judicial access, and did not guarantee prompt judicial review through disposition.

In its decision the majority focused on the plurality and concurring opinions in *FW/PBS, Inc. v. City of Dallas, supra*, as well as the seminal case of *Freedman v. Maryland, supra*, to determine if the Paducah ordinance met the requirements of the First Amendment:

> Although the status of the third *Freedman* requirement remains unclear in the licensing context, this Circuit has previously noted that, under *FW/PBS,* at

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4. The Sixth Circuit opinion is reproduced as an Appendix to this Brief. The quoted statement is found at App. 7a.

> least the first two *Freedman* safeguards are essential for a licensing scheme to comport with the First Amendment. *See East Brooks Books*, 48 F.3d at 224 (invalidating Memphis, Tennessee sexually oriented business ordinance that failed to ensure prompt judicial review). Thus, a licensing scheme must remove standardless discretion from government officials and contain two procedural safeguards: (1) the decision whether to issue a license must be made within a specified brief period, and the status quo must be maintained during that period and during judicial review, and (2) there must be a "guarantee of prompt judicial review." *Id.* at 225.
>
> App. at 10a.

The majority then discussed the irreconcilable conflict among the circuits:

> Moreover, this Circuit and a number of other circuits have held that a licensing scheme must reasonably ensure a prompt judicial determination, and not mere access to judicial review. *See Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998) ("'prompt judicial review' means the opportunity for a prompt hearing and a prompt decision by a judicial officer"); *11126 Baltimore Blvd., Inc. v. Prince George's County, Maryland*, 58 F.3d 988, 1000-01 (4th Cir.) (en banc), *cert. denied*, 516 U.S. 1010 (1995) (under

> *FW/PBS* and its progeny, prompt judicial determination is required); *East Brooks Books,* 48 F.3d at 225 (prompt judicial adjudication required). Although the First, Fifth, and Eleventh Circuits have concluded that "for licensing ordinances, prompt judicial review only means access to prompt judicial review," *Boss Capital, Inc. v. City of Casselberry,* 1999 WL 688046, slip op. at *4 (11th Cir. Sept. 3, 1999), this Court remains persuaded that Supreme Court precedent requires a sufficiently prompt determination on the merits.
>
> App. at 15a - 16a.[5]

In a mirror image of the split among the circuits, there was a split among the Sixth Circuit panel! In a dissent, Judge Merritt also wrote about the conflict, deciding that the position taken by the Eleventh Circuit in *Boss Capital* was the correct application of *FW/PBS* and *Freedman*:

> The broad language of *FW/PBS* holds only that "the possibility of prompt judicial review or an avenue for prompt judicial review" is required. *See FW/PBS,* 493 U.S. at 228-29. While some language in Justice Brennan's concurring opinion indicating that a "prompt judicial determination" might be required has caused discussion among the Circuit courts, several Circuits

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5. The panel must not have felt that the Seventh Circuit decided the issue in *Graff.*

have agreed that "prompt judicial review" only means access to prompt judicial review. *See, e.g., Boss Capital, Inc. v. City of Casselberry,* 187 F.3d 1251 (11th Cir. 1999); *TK's Video, Inc. v. Denton County,* 24 F.3d 705 (5th Cir. 1994); *Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir. 1993) (en banc); *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth.,* 984 F.2d 1319 (1st Cir. 1993). In addition, the Second Circuit has intimated that it would follow this line of reasoning. *See, Beal v. Stern,* 184 F.3d 117 (2d Cir. 1999) (noting, without deciding, that prompt access to judicial review in state courts would satisfy the Freedman test). I do not believe the Court intended for a prompt judicial determination to be required in a situation where the city has provided for the broadest type of judicial review within its powers. To find otherwise is to invalidate broadly-worded city ordinances on the basis of the swiftness or slowness of that particular state's judicial procedures, a test that could force Circuits to come to seemingly arbitrary and inconsistent decisions based on the various procedures of the different state court systems within their reach. For these reasons, I do not believe *FW/PBS* requires the result the Court reaches here.

App. at 24a - 25a.

Thus, we have a conflict among the circuits, a conflict among the district courts,[6] and a division among panel members in the same case.[7] This Court must resolve the conflict.

CONCLUSION

As Boss Capital pointed out in its original Petition, this issue is of critical concern. While many of the cases considering the issue have arisen in the context of adult entertainment businesses, the federal courts are wrestling with the identical issue in core political speech cases. *Beal v. Stern, supra* is a challenge to an ordinance of the City of New York that requires a permit for core political speech in a public park, the traditional public forum. The Seventh Circuit heard oral argument in January, 2000 in a case involving permits for

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6. There are even conflicts within district courts. For instance, as Boss Capital noted in its Petition, one judge in the Middle District of Florida ruled that prompt access to the courts is all that is required. *Florida Video Xpress, Inc. v. Orange County*, 983 F.Supp. 1091 (M.D. Fla. 1997). A second judge ruled (prior to the decision in *Boss Capital*) that a prompt judicial determination is required. *Bledsoe v. City of Jacksonville Beach*, 20 F.Supp.2d 1317, 1326 (M.D. Fla. 1998).

Boss Capital noted in its Petition that district courts in circuits that have not decided this issue are left to their own determinations of *Freedman*'s requirements.

7. Arguably, there is a split among different panel decisions in the Eleventh Circuit. The earlier opinion in *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1995), *cert. denied*, 514 U.S. 1066 (1995) seemed to indicate that the Eleventh Circuit required prompt judicial disposition. Other federal circuit read that decision as such. *See, e.g., Baby Tam & Co.* The *Boss Capital* panel reached the opposite conclusion, and said that *Redner* had not decided the issue.

political parades on city streets, another situation involving core political speech in a traditional public forum. *MacDonald v. City of Chicago*, Seventh Circuit Case No. 98-3836.[8] It has a second case before it on the same issue. *MacDonald v. Chicago Park District*, Seventh Circuit Case No. 99-1811.[9] The Second Circuit has also heard oral argument in a challenge to the New York City parade permit ordinance. *MacDonald v. Safir*, Second Circuit Case No. 99-7010.[10] The Eleventh Circuit is considering a case in which a challenge was brought against a public rally permit ordinance. *Cannabis Action Network, Inc. v. City of Gainesville*, Eleventh Circuit Case No. 98-2837.[11] Each case involves a permit for core political speech in a public forum. Each case involves the question of what constitutes prompt judicial review. Thus, the question does not only affect sexually explicit speech. It impacts on speech at the pinnacle of First Amendment protection.

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8. The unreported District Court's opinion in this case can be found at 1999 WL 102775.

9. The unreported District Court's opinion in this case can be found at 1999 WL 203288.

10. The District Court opinion in this case is reported as *MacDonald v. Safir*, 26 F.Supp.2d 664 (S.D. N.Y. 1998).

11. In this case, one district judge found, after a hearing on an application for preliminary injunction, that the plaintiffs had demonstrated a substantial likelihood of success on its claim that a permit ordinance for public rallies in a public park failed to provide for prompt judicial review. *Michel-Trapaga v. City of Gainesville*, 907 F. Supp. 1508 (N.D. Fla. 1995). The suit involved a facial challenge to the ordinance. Subsequently, on cross-motions for summary judgment, a second judge found that because the ordinance provided prompt access to the courts, it met the prompt judicial review requirement.

In a concurring opinion in *Graff v. City of Chicago, supra*, Judge Ripple wrote that the difficulty in correctly understanding and applying this Court's decision in *FW/PBS*, as that decision affected the requirement of procedural safeguards mandated by *Freedman*, should be resolved by this Court: ". . . [T]his case presents a most difficult problem for the court, a problem that, in the final analysis, can only be resolved by additional guidance from the Supreme Court of the United States." 9 F.3d at 1333. He added: "I respectfully suggest that this case is deserving of further review in the Supreme Court of the United States." *Id*, at 1335.[12]

Boss Capital asks this Court to issue its Writ of Certiorari, so that this critical question can be settled.

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12. For whatever reason, this Court did not review the *Graff* decision. One can speculate that since there was no reasonable fear that the Chicago ordinance would lead to censorship, the result did not significantly implicate First Amendment concerns.

APPENDIX

Opinion of the United States Court of Appeals for the Sixth Circuit, dated February 2, 2000

Appeal from the United States District Court
for the Western District of Kentucky at Paducah.

No. 98-00241– Thomas B. Russell, District Judge.

Argued: September 22, 1999

Decided and Filed: February 2, 2000

MERRITT and CLAY, Circuit Judges; ALDRICH,* District Judge.

COUNSEL

ARGUED: Charlotte B. Scott, BRADLEY, BRYANT & KAUTZ, Paducah, Kentucky, for Appellant. David L. Kelly, DENTON & KEULER, Paducah, Kentucky, for Appellees. **ON BRIEF**: Charlotte B. Scott, William E. Scent, BRADLEY, BRYANT & KAUTZ, Paducah, Kentucky, for Appellant. David L. Kelly, DENTON & KEULER, Paducah, Kentucky, for Appellees.

ALDRICH, D. J., delivered the opinion of the court, in which CLAY, J., joined. MERRITT, J. delivered a separate dissenting opinion.

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* The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

ALDRICH, District Judge. Plaintiff-Appellant Nightclubs, Inc. ("Nightclubs") brought this action against the City of Paducah, Kentucky; the City Commission of the City of Paducah, Kentucky; Albert Jones, in his official capacity as the Mayor of Paducah, Kentucky; and James Zumwalt, in his official capacity as the City Manager of Paducah, Kentucky (collectively "the City" or "Paducah"). Pursuant to 42 U.S.C. § 1983, Nightclubs challenges the constitutionality of a Paducah ordinance that provides for the licensing and regulation of sexually oriented businesses and their employees. The District Court denied Nightclubs' motion for a preliminary injunction in substantial part. Nightclubs appeals that denial, arguing that the ordinance's licensing scheme amounts to an unlawful prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and § 1292(a)(1). Because the District Court erred in not enjoining the licensing scheme, we REVERSE, VACATE, and REMAND.

I.

Nightclubs, Inc., doing business as "Regina's House of Dolls," is a Kentucky corporation that owns and operates an adult entertainment business featuring performances by female dancers. The business has been operating continuously in Paducah, Kentucky since 1987. On August 11, 1998, the City of Paducah enacted Ordinance No. 98-8-5925 ("the ordinance"), which is designed to regulate sexually oriented businesses. Regina's House of Dolls qualifies as an "adult

cabaret" under § 11-2(3) of the ordinance.[1]

In addition to regulating the substantive operation of sexually oriented businesses, the ordinance requires such businesses to obtain licenses from the City prior to operation. *See* Ord. § 11-6(a). The ordinance also requires individuals who work as managers and entertainers in sexually oriented businesses to obtain employee licenses from the City. *See Id.* Section 11-6 delineates the licensing application procedures. *See* Ord. § 11-6(b)-(g). An applicant for a sexually oriented business license must submit various pieces of information to the City, including a complete set of fingerprints "on forms as prescribed by the Chief of Police," his or her social security number and/or tax identification number, and a description of "the nature of the activity or activities to be engaged in at the establishment." Ord. § 11-6(e). The applicant must also disclose certain details regarding any crime(s) that he or she has been convicted of "relating to prostitution, solicitation, or sexual offenses" within the three years prior to the date of the application. Ord. § 11-6(e)(3). Section 11-6(e)(11) states that the applicant must already possess a current "City business license," and that "the premises must be inspected and found to be in compliance with health, fire, zoning, plumbing and building codes of the City." Ord. § 11-6(e)(11).

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1. The ordinance defines "adult cabaret" as "a night club, bar, restaurant, or similar commercial establishment which regularly features: (a) Persons who appear in a state of nudity or semi-nude; or (b) Live performance [sic] which are characterized by the exposure of 'specified anatomical areas' or by 'specified sexual activities'; or (c) Films, motion pictures, video cassettes, slides or other
1. (Cont) photographic reproductions which are characterized by the depiction or description of 'specified sexual activities' or 'specified anatomical areas'." *See* Ord. § 11-2(3).

Section 11-7(a) provides as follows:

> Upon receipt of an application properly filed with the Director and upon payment of the non-refundable application fee, the Director or his/her designee shall immediately stamp the application as received and shall immediately thereafter initiate an investigation of the application and the proposed sexually oriented business by all appropriate City departments and agencies. The City shall approve or deny the issuance of a license to an applicant within ten (10) business days after receipt of a completed sexually oriented business application.

Ord. § 11-7(a). Thus, once an applicant submits a "completed" business license application in accordance with § 11-6, the City Manager must immediately instruct various City departments to conduct the appropriate investigations.[2] Section 11-7(a) further declares that the City "shall approve" the issuance of a sexually oriented business license "unless" the City determines that the application is deficient in one of eight specified ways. *Id.* That is, Paducah will deny a business license if the applicant is overdue on any payments to the City, has failed to provide requisite information on the application, has failed to pay the license fee, or otherwise "has failed to comply with any provision or requirement of this ordinance." *Id.* A business license will also be denied if the premises to be used for the

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2. Although the ordinance continuously refers to "the Director" of the City, the ordinance defines the Director as "the City Manager or his/her designee." As the City Manager is a defendant in this action, the Court will refer to this individual as "the City Manager" rather than "the Director."

sexually oriented business is not in compliance with zoning requirements or with applicable health, fire, building, and plumbing codes. *Id.* Licenses are to be renewed annually under these same procedures. *See* Ord. § 11-10(a)-(b).

Sections 11-15 and 11-17 govern appeals from the denial, suspension, or revocation of licenses. Section 11-15 provides that an aggrieved applicant may appeal the denial of a license to the Board of Commissioners ("the Board") within ten days of receiving notice that his or her application was denied. *See* Ord. § 11-15(b). The Board must hold a hearing on the appeal within ten days of the filing of the notice of appeal. *Id.* The applicant may be represented by counsel, present evidence, and cross-examine witnesses at the hearing; the City Manager has the burden to prove that denial of the license was appropriate. *See* Ord. § 11-15(c). The Board must render a decision in writing within five days of hearing the appeal. *See* Ord. § 11-15(d). If the Board chooses to remand the matter to the City Manager "for further review and action," the City Manager must complete further review within ten days of the remand. *Id.* Section 11-15(e) states, "The applicant shall have the right to seek prompt judicial review of the Board of Commissioners' decision in any court of competent jurisdiction as provided by law. The action shall be promptly reviewed by the court." Ord. § 11-15(e). Section 11-17 prescribes almost identical appeal rights for a license holder seeking an appeal of the suspension or revocation of a license. See Ord. § 11-17(a)-(f).

Soon after the Paducah ordinance went into effect, Nightclubs filed this action, challenging the constitutionality of the ordinance both on its face and as applied.[3] After conducting

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3. Adult World, a store that sells books, magazines, and films, filed a companion case, but that case is not before us on appeal.

a hearing on the plaintiff's motion for a preliminary injunction, the District Court enjoined only those sections of the ordinance pertaining to the high cost of licensing fees and the requirement that landowners submit notarized acknowledgments along with license applications. *See* Ord. § 11-6(e)(13), 11-9(a)-(d).[4] The District Court declined to enjoin the remaining operational and licensing provisions of the ordinance. Nightclubs appeals that denial with respect to the licensing scheme, arguing that on its face, the scheme is an unconstitutional prior restraint upon one's freedom of expression.

II.

In deciding whether to grant a preliminary injunction, a district court must consider and balance four factors: (1) whether the plaintiff has established a substantial likelihood or probability of success on the merits; (2) whether there is a threat of irreparable harm to the plaintiff; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by granting injunctive relief. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), *cert. denied*, 119 S.Ct. 1496 (1999). This Court reviews the grant or denial of a preliminary

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4. Section 11-6(e)(13) requires a business license applicant to submit a notarized statement from the landowner of record "acknowledging that a sexually oriented business establishment is permitted to be located on the real property." Ord. § 11-6(e)(13). The District Court found this provision burdensome because the landowner is not legally obligated to give such a statement, and concluded that the City had failed to show how this requirement furthers a substantial government interest. The District Court enjoined § 11-9, which deals with application and annual license fees, because Paducah had failed to justify the high cost of the fees. The City did not cross-appeal the District Court's decision on these issues.

injunction for an abuse of discretion. *Id.* "'The district court's determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard.'" *Id.* (quoting *Blue Cross & Blue Shield Mutual of Ohio v. Blue Cross and Blue Shield Ass'n,* 110 F.3d 318, 322 (6th Cir. 1997)). In cases involving the First Amendment, the crucial inquiry is usually whether the plaintiff has demonstrated a likelihood of success on the merits. *Id.* This is so because, as in this case, the issues of the public interest and harm to the respective parties largely depend on the constitutionality of the statute. *Id.*

III.

The sole issue raised on appeal is whether Paducah's licensing scheme, on its face, contains adequate procedural safeguards as required by the First Amendment. We conclude that it does not.

As an initial matter, we note that Nightclubs has standing to bring a facial attack against the City's licensing scheme. "In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license." *Freedman v. Maryland,* 380 U.S. 51, 56 (1965). A form of unbridled discretion is the failure to place brief, specific time limits on the decision-making process. *See id.* at 57; *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224, *reh'g denied* (6th Cir.), *cert. denied,* 516 U.S. 909 (1995). The rationale for permitting a facial challenge is that when a licensing scheme allegedly contains a risk of delay, "'every application of the statute create[s] an impermissible risk

of suppression of ideas.'" *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 223-24 (1990) (plurality op.) (quoting *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 798 n.15 (1984)) (brackets in original). Because Nightclubs claims that Paducah's licensing scheme creates an impermissible risk of delay and lacks constitutionally-required safeguards, Nightclubs has standing to challenge the ordinance on its face.[5]

A "prior restraint' exists when speech is conditioned upon the prior approval of public officials. *See, e.g., Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. *546, 553* (1975) (denial of use of public forum without procedural safeguards is unconstitutional prior restraint). Although prior restraints "are not unconstitutional per se," they come to court bearing a heavy presumption against their validity. *Id.* at 558 (citations omitted). Prior restraints are presumptively invalid because they typically involve "two evils that will not be tolerated": (1) the risk of censorship associated with the vesting of unbridled discretion in government officials; and (2) "the risk of indefinitely suppressing permissible speech" when a licensing law fails to provide for the prompt issuance of a license. *FW/PBS,* 493 U.S. at 225-27.

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5. Paducah does not dispute that the plaintiff engages in activity protected by the First Amendment. *See, e.g., Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 566 (1991) (erotic dancing constitutes expressive activity "within the outer perimeters of the First Amendment"). Nonetheless, the dissent posits that a facial challenge is not "the appropriate course of action" in this case because, in effect, the City's attorney promised at oral argument that the City would apply the ordinance in a constitutional manner. However, there is no evidence in the record to support the limiting construction that the dissent is so eager to read into the ordinance.

In *Freedman*, the Supreme Court invalidated a Maryland film censorship statute under the First Amendment because the statute lacked necessary procedural safeguards. *Freedman*, 380 U.S. at 59-60. The Court held that three procedural safeguards are required to avoid constitutional infirmity. *Id.* at 58-59. First, the decision whether to issue a license must be made within a "specified brief period," and, if judicial review is sought, the status quo must be preserved pending "a final judicial determination on the merits." *Id.* at 59. Second, the scheme "must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id.* Third, a censorship scheme must place the burden of instituting judicial proceedings and proving that expression is unprotected on the censor rather than the exhibitor. *Id.* at 58. The holding of *Freedman* has been reaffirmed and applied in a long line of prior restraint cases. *See, e.g., Riley v. National Fed'n of the Blind of N. C., Inc.*, 487 U.S. 781, 802 (1988) (invalidating state licensing requirement for fundraisers that permitted indefinite delays); *Southeastern Promotions*, 420 U.S. at 560 (reaffirming *Freedman* requirements and striking down system regulating use of public forum); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 374 (1971) (applying *Freedman* requirements to forfeiture proceedings for obscene materials).

In *FW/PBS*, the Supreme Court applied *Freedman* to a Dallas, Texas ordinance similar to the Paducah ordinance at issue here. The Dallas ordinance required sexually oriented businesses to pass municipal inspections in order to obtain mandatory licenses. *FW/PBS*, 493 U.S. at 227. In a plurality opinion, Justice O'Connor, joined by Justices Stevens and Kennedy, held that two of the three *Freedman* safeguards "are essential" to prevent a licensing scheme from causing undue delay in the issuance of a license: "the licensor must make the decision whether to issue the license within a specified and

reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied." *Id.* at 228. The plurality concluded that the third *Freedman* requirement – that the censor bear the burden of going to court and proving the unprotected nature of the speech – is inapplicable when a system of prior restraint does not require a public official to pass judgment on the content of any speech. *Id.* at 229-30. In a concurring opinion, Justice Brennan, joined by Justices Marshall and Blackmun, expressed the belief that all three of the procedural safeguards outlined in *Freedman* must be applied to any system of prior restraint. *Id.* at 239 (Brennan, J., concurring).

Although the status of the third *Freedman* requirement remains unclear in the licensing context, this Circuit has previously noted that, under *FW/PBS*, at least the first two *Freedman* safeguards are essential for a licensing scheme to comport with the First Amendment. *See East Brooks Books*, 48 F.3d at 224 (invalidating Memphis, Tennessee sexually oriented business ordinance that failed to ensure prompt judicial review). Thus, a licensing scheme must remove standardless discretion from government officials and contain two procedural safeguards: (1) the decision whether to issue a license must be made within a specified brief period, and the status quo must be maintained during that period and during judicial review, and (2) there must be a "guarantee of prompt judicial review." *Id.* at 225.

Nightclubs argues that Paducah's ordinance lacks both of these mandatory safeguards. We agree. First, on its face, the ordinance fails to ensure that the City will decide whether to issue a license within a brief specified time period during which the status quo is maintained. Although the ordinance states that Paducah will approve or deny an application within ten days,

the ordinance also states that no license will issue unless the City executes, and the premises passes, a variety of building inspections. *See* Ord. § 11-7(a). No specific time limits for completion of these inspections are placed on the "appropriate City departments and agencies." *Id.* Further, the ordinance does not indicate that a license shall issue if any of the City departments fails to complete a mandatory inspection within a timely period.[6] In this regard, the Paducah ordinance is

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6. At oral argument, defendants' counsel "conceded" that the ordinance requires the City to issue a license within ten days even if the City fails to complete the necessary inspections. The dissenting opinion interprets this "concession" as a limiting construction that binds this Court. Both the City and the dissent fail to recognize that any limiting construction must "be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. *750,* 770 (1988) (ordinance vesting unbridled discretion in city official is unconstitutional on its face). First Amendment rights would rest on a very thin reed indeed if the promises of a city attorney at oral argument were alone sufficient to authoritatively limit the meaning of an ordinance. The record in this case is devoid of any evidence that a state court has construed the Paducah ordinance or that "a well-understood and uniformly applied practice has developed that has virtually the force of a judicial construction." *Id.* at n.11. For that reason, the dissent's reliance on *Ward v. Rock Against Racism,* 491 U.S. 781 (1989), is totally misplaced. In *Rock Against Racism,* which was not a prior restraint case, but, rather, a case involving a time, place, or manner regulation, the District Court had "expressly found" that the city engaged in policies and practices that limited the discretion of public officials. *Id.* at 795. There is no such finding in this case. We can neither presume that municipal officials will act in good faith and respect a speaker's First Amendment rights, nor read a requirement into an ordinance that is not fairly and evidently present. *See City of Lakewood,* 486 U.S. at 770, n. 11; *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.,*

indistinguishable from the Dallas ordinance struck down in *FW/PBS*. *See FW/PBS*, 493 U.S. at 227 (although ordinance stated license would issue within 30 days of application, ordinance did not "set a time limit within which the [necessary] inspections must occur"). Moreover, § 11-6(e) delineates the information that comprises a "completed" business license application. *See* Ord. § 11-6(e). The eleventh item in this list is that the applicant "must have a current City business license, and the premises must be inspected and found to be in compliance with health, fire, zoning, plumbing and building codes." Ord. § 11-6(e)(11). Thus, § 11-6(e)(11) seems to require these inspections to be completed *before* the ten-day investigatory period in § 11-7(a) will be triggered. The ordinance does not explain how inspections can be conducted prior to submission of a completed license application, and such a requirement is plagued with the risk of indefinite delays. Even if § 11-6(e)(11) can be read to merely foreshadow the City's responsibilities under § 11-7(a), these sections fail to ensure that a license will be issued within a brief specified time period for the reasons discussed above.

Furthermore, the ordinance fails to preserve the status quo either during the administrative process for license renewals or pending judicial review of decisions to suspend, revoke, or not renew licenses. If Paducah chooses not to renew a sexually oriented business license, that business must cease operation immediately. The previous license does not remain in effect while an appeal proceeds before the Board or, later, while an action is pending in court. *See* Ord. §§ 11-10, 11-15. In addition, if the City suspends or revokes a license for one of the reasons provided in § 11-16, that decision will be stayed while an appeal proceeds before the Board, but it will not be stayed pending judicial review. *See* Ord. § 11-17(b), 11-17(f).

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6. (Cont) 163 F.3d 341, 359 (6th Cir. 1998).

Accordingly, the ordinance fails to maintain the status quo pending review as the First Amendment requires. *See Freedman*, 380 U.S. at 59 ("[a]ny restraint imposed in advance of a final judicial determination on the merits must . . . be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution").

The second *Freedman* safeguard – the guarantee of prompt judicial review – is also lacking in this case. The ordinance provides that an applicant, or licensee whose license has been suspended or revoked, may seek a review of the Board's decision "in any court of competent jurisdiction." Ord. § 11-15(e), 11-17(f). Although Kentucky law does not provide for judicial appeals from administrative decisions, an aggrieved applicant or licensee may file "an original action" in Kentucky court. *See* K.R.S. § 23A.010(4) (review of administrative decision constitutes not appeal, but original action). The case then proceeds according to standard court rules, with the state court conducting a "limited trial de novo, including review of the record of the board and other evidence." *City of Covington v. Tranter*, 673 S.W.2d 744, 748 (Ky. Ct. App. 1984). The person seeking review of the administrative decision generally bears the burden of furnishing the transcript to the state court. *Id.* Kentucky law does not in any way limit the time for furnishing transcripts, conducting a court hearing, or rendering a judicial decision.

This procedure for judicial review contains an even greater potential for indefinite delays than the Memphis scheme this Court found unconstitutional in *East Brooks Books*. *See East Brooks Books*, 48 F.3d at 225. In that case, Tennessee law expressly authorized judicial review of administrative decisions, but no time limits were placed on the city's obligation to provide an administrative transcript. *Id.* Moreover, although the appeal would have had "precedence

over other litigation," there was no assurance that the Tennessee court would have resolved the appeal in a timely manner. *Id.* We noted that under Supreme Court case law, judicial review processes with "potential delays of over five months are impermissible." *Id.* (discussing *Southeastern Promotions*, 420 U.S. at 562, and *Thirty-Seven Photographs*, 402 U.S. at 373-74). Kentucky law fails to guarantee judicial review of Paducah's licensing decisions within any particular period of time, let alone within five months.

The defendants argue, and the District Court concluded, that the requirement of prompt judicial review is satisfied because an aggrieved applicant or licensee may seek preliminary injunctive relief soon after filing an original action in Kentucky court. This argument both misinterprets a long line of legal precedent in the area of prior restraints and minimizes the importance of the First Amendment freedoms at stake. As previously discussed, *Freedman*, *FW/PBS*, and *East Brooks Books* require an assurance of prompt judicial review; a theoretical possibility of expeditious judicial review is not constitutionally sufficient. A guarantee of prompt judicial review is necessary "because undue delay results in the unconstitutional suppression of protected speech." *FW/PBS*, 493 U.S. at 228. If an applicant challenges the Board's decision to uphold the denial of a license, there is nothing in Kentucky law requiring the state court to swiftly schedule a hearing on a motion for injunctive relief. While we trust state courts to exercise due diligence, we cannot be sure that a state judge, who often is elected and toiling under a busy docket, will conduct a hearing and render a decision in a prompt manner.[7]

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7. The District Court not only assumed that the state court would speedily issue injunctive relief, but also assumed that a judicial appeal would be brought on First Amendment grounds. There could, of course, be non-constitutional reasons for challenging the denial of

Moreover, this Circuit and a number of other circuits have held that a licensing scheme must reasonably ensure a prompt judicial determination, and not mere access to judicial review. *See Baby Tam & Co., Inc. v. City of Las Vegas,* 154 F.3d 1097, 1101 (9th Cir. 1998) ("'prompt judicial review' means the opportunity for a prompt hearing and a prompt decision by a judicial officer"); *11126 Baltimore Blvd., Inc. v. Prince George's County, Maryland*, 58 F.3d 988, 1000-01 (4th Cir.) (en banc), *cert. denied*, 516 U.S. 1010 (1995) (under *FW/PBS* and its progeny, prompt judicial determination is required); *East Brooks Books,* 48 F.3d at 225 (prompt judicial adjudication required). Although the First, Fifth, and Eleventh Circuits have concluded that "for licensing ordinances, prompt judicial review only means access to prompt judicial review," *Boss Capital, Inc. v. City of Casselberry,* 1999 WL 688046, slip op. at *4 (11th Cir. Sept. 3, 1999),[8] this Court remains

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7. (Cont.) a license, such as a dispute over whether the applicant falsely answered a question on the application. *See* Ord. §§ 11-7(a)(3), 11-8(2). Because any denial of a license would necessarily implicate the First Amendment, a licensing scheme must, on its face, ensure that all aggrieved applicants will be granted a prompt review – even those employees and business owners who do not have the wherewithal to launch costly constitutional attacks against the ordinance.

8. The Eleventh Circuit recently held in *Boss Capital,* as the First and Fifth Circuits previously have held, that the mere availability of a judicial forum may satisfy the prompt judicial review requirement. *See Boss Capital,* 1999 WL 688046, slip op. at *5; *TK's Video, Inc. v. Denton County, Texas*, 24 F.3d 705, 709 (5th Cir. 1994); *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993). When the Seventh Circuit was presented with the question, an en banc panel of that court sharply split on the issue. *See Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir. 1993), *cert. denied.* 511 U.S. 1085 (1994).

persuaded that Supreme Court precedent requires a sufficiently prompt determination on the merits.

Like the Fourth and Ninth Circuits, we do not read Justice O'Connor's plurality opinion in *FW/PBS* as relaxing *Freedman's* requirement of "a prompt final judicial decision." *Freedman*, 380 U.S. at 59. *See Baby Tam*, 154 F.3d at 1102 ("plurality took issue only with *Freedman's* requirement that the censor bear the cost of going to court obtain judicial review; otherwise, *FW/PBS* offered nothing different from *Freedman's* concept of what 'judicial review' meant"); *11126 Baltimore*, 58 F.3d at 1000 ("Justice O'Connor's decision in *FW/PBS* cannot properly be read to relax the *Freedman* prompt judicial review requirement"). Justice O'Connor described the first two *Freedman* requirements as "essential"; she gave no indication that she was modifying the second requirement of prompt judicial review. *See FW/PBS*, 493 U.S. at 228-29. Although she spoke of "the possibility of" and "an avenue for" prompt judicial review, *see id.*, Justice O'Connor in no way altered what "judicial review" clearly means under *Freedman* and its progeny: "a final judicial determination on the merits."[9] *Freedman*, 380 U.S. at 59.

Indeed, if mere access to a judicial forum were sufficient, then the second *Freedman* safeguard would be

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9. Even if Justice O'Connor's plurality opinion could be read as reducing the prompt judicial review requirement, it was joined by only two other justices, and, therefore, could not have overruled *Freedman*. Further, there is no doubt that in *FW/PBS*, Justice Brennan, along with the two justices joining his concurring opinion, unequivocally maintained that all three *Freedman* requirements should apply, including the requirement of "a prompt judicial *determination*." *FW/PBS*, 493 U.S. at 239 (Brennan, J., concurring) (emphasis added).

rendered virtually meaningless. *See Baby Tam,* 154 F.3d at 1101. Justice O'Connor observed in *FW/PBS* that "the core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time," and that the first two *Freedman* safeguards work together to ensure that the *entire* review process will be expeditious. *FW/PBS,* 493 U.S. at 228. As the Ninth Circuit pointed out in *Baby Tam,*

> The phrase 'judicial review' compels this conclusion. The phrase necessarily has two elements – (1) consideration of a dispute by a judicial officer, and (2) a decision. Without consideration, there is no review; without a decision, the most exhaustive review is worthless. In baseball terms it would be like throwing a pitch and not getting a call. As legendary major league umpire Bill Klein once said to an inquisitive catcher: 'It ain't nothin' till I call it.' This is also true of judicial review. Until the judicial officer makes the call, it ain't nothin'.

Baby Tam, 154 F.3d at 1101-02.

Quite obviously, a municipality has no authority to control the period of time in which a state court will adjudicate a matter.[10] Indeed, a city does not even possess the authority to

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10. Only a state legislature has the power to pass legislation requiring state courts to resolve certain types of cases within a particular period of time. For example, legislatures have mandated statutorily that, to ensure one's right to a speedy trial, courts must conduct criminal trials within a certain amount of time. *See, e.g.,* K.R.S. § 421.510 (when defendant is charged with sexual abuse of a person under 16 years of age, defendant must be tried within 90

create a mere "avenue for prompt judicial review; the availability of judicial review is, in effect, dependent upon state law. We recognize that, as a practical matter, the requirement of prompt judicial review means that a city seeking to impose a licensing scheme must take certain steps to avoid constitutional infirmities. Specifically, a city may very well have to go beyond merely maintaining the status quo and actually permit the communication of protected expression until a judicial decision is rendered on a matter. *See 11126 Baltimore,* 58 F.3d at 1001 n.18 (county could entirely avoid constitutional problem "by permitting adult bookstores to operate until a judicial determination is rendered affirming a denial of a special permit"). For example, an ordinance could provide that a license shall issue if a reviewing court fails to reach a decision within a reasonably brief period of time. Similarly, a city could also issue provisional licenses to those businesses and employees who choose to seek judicial review of license denials. As discussed previously, the Paducah ordinance fails to even maintain the status quo, let alone consider the practicalities involved with the necessity of prompt judicial review.

There are other measures that a city may institute to help ensure that judicial review will be expeditious. An ordinance may provide that an administrative transcript must be submitted to a court within a brief, specified period of time. Cities may also petition their state legislatures to pass laws that would obligate state courts to resolve municipal administrative appeals within a reasonably short period of time. While these measures may seem burdensome on first blush, they are reasonable in

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10. (Cont) days of hearing); K.R.S. § 500.110 (Kentucky court must try prisoner facing indictment on additional charges within 180 days of prisoner's request); Ky. RCr. 9.02 (trials of all criminal defendants in Kentucky shall be held as promptly as possible).

light of the great importance this nation attaches to the freedom of expression.[11] It is precisely because of this importance that prior restraints upon speech are strongly disfavored and presumptively invalid in the first place. As courts long have recognized, the procedural safeguards outlined in *Freedman, FW/PBS,* and their progeny are necessary to prevent licensing-scheme prior restraints from being used as instruments for the suppression of expression.

In sum, a system of prior restraint that fails to ensure a reasonably prompt decision by a judicial officer cannot be squared with the First Amendment. *See Baby Tam,* 154 F.3d at 1101-02; *East Brooks Books,* 48 F.3d at 225. Because Paducah's ordinance lacks such an assurance, it is unconstitutional.

IV.

We hold that the City's licensing scheme, on its face, violates the First Amendment because it fails to provide that the City will make a licensing decision within a brief specified time period, that the status quo will be maintained during this period and during judicial review, and that a prompt judicial determination will be available. Accordingly, we conclude that the District Court erred in denying the plaintiffs request to preliminarily enjoin the licensing scheme, and we REVERSE and VACATE the District Court's order in this regard. We also REMAND the case for a determination of whether the licensing

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11. It is worth noting that cities have other ways to regulate the secondary effects of sexually-oriented businesses besides imposing licensing schemes upon them. The Paducah ordinance itself includes a number of substantive regulations, such as a requirement that performers remain six feet away from patrons. Zoning requirements are another common way of regulating sexually-oriented businesses.

scheme is severable from the remainder of the ordinance, and for further proceedings consistent with this opinion.

DISSENT

MERRITT, Circuit Judge, dissenting. This appeal is a First Amendment facial challenge to Paducah's ordinance regulating the issuance of licenses for sexually-oriented businesses, including nude dancing night clubs like plaintiffs. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) is controlling. In that case, the Supreme Court set out two requirements for such licensing schemes: The scheme must provide for definite and specific time limits within which a license is to be granted or denied, and an avenue for prompt judicial review must be established. The Paducah ordinance satisfies both requirements.

The ordinance itself is clear enough on its face. Section 11-79(a) requires an "immediate" investigation "upon receipt of an application," and "the City shall approve or deny the issuance of a license to an applicant within ten (10) business days." The ordinance on its face requires Paducah's various administrative investigations and its final decision to take place "within ten (10) business days." So I do not see any problem on the issue of delay. Even if there were some ambiguity, the City has conceded that it must finish its work and issue a decision within the 10-day period. If the City delays beyond that time, the plaintiff would be entitled immediately to an injunction.

In addition, the Court's opinion proceeds under the incorrect assumption that challenging this city ordinance on its face is the appropriate course of action under the circumstances. It is true that our First Amendment case law has long allowed

facial challenges to regulations implicating First Amendment rights, even in situations where facial challenges would otherwise be deemed inappropriate. As the Court noted in *FW/PBS*, "[a]lthough facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decision maker and where the regulation is challenged as overbroad." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990) (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 and n.15 (1984)).

But that is not the end of the matter. It is the policy of the federal courts, even in the First Amendment context, to consider any limiting constructions which the government places on its own regulations. Even if the ordinance were not pluperfectly clear on its face that the City has only 10 days, the City has stated that its interpretation of the ordinance is that the City has 10 days within which to complete the inspections necessary for the issuance of a license – precisely the construction which Nightclubs, Inc. concedes completely satisfies the definite and specific time limits requirement of *FW/PBS*.

In a similar situation a few years ago, the Supreme Court was faced with a facial invalidity challenge on First Amendment grounds in conjunction with a concession by the government enforcement agency (in that case, the City of New York) that they would interpret the ordinance in a way which would cure the ordinance of its defects. The Court noted that "the city has interpreted the guideline in such a manner as to provide additional guidance to the officials charged with its enforcement." *Ward v. Rock Against Racism*, 491 U.S. 781, *795* (1989). The Court then found that "[a]dministrative interpretation and implementation of a regulation are, of course,

highly relevant to our analysis, for '[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.'" *Id.* at 795-96 (quoting *Hoffman Estates v. The Flipside, Inc.*, 455 U.S. 489, 494 (1982)). Finally, the Court concluded that any defect on the face of the ordinance was "more than remedied by the city's narrowing construction." *Id.*

Rock Against Racism is not the only example of the federal courts' reluctance to strike an ordinance, even on a First Amendment facial challenge, unless absolutely necessary. When the Supreme Court first announced its intention to allow First Amendment facial challenges, it tempered that decision by noting that "we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). This language in *Broadrick* was quoted by the Court when it held that "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) (finding that an ordinance could not be challenged facially when there was no proof that it would be applied any differently to others than it had been applied to plaintiffs). There is no realistic danger that this ordinance will compromise First Amendment rights of third parties when the enforcing organization, the City of Paducah, has agreed to interpret the statute in a way that comports with the First Amendment.

When we analyze the mandatory language of the ordinance itself and take into account the City's own interpretation of its duties under the ordinance, I agree with the District Court that there is no problem here with delay. Our

Court has gone out of its way to give the ordinance an unreasonable interpretation. Instead of emasculating the ordinance in order to hold it invalid, it is our responsibility to give the law a "rational and sensible construction" that will uphold its validity. *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982). *See* Sutherland, Statutory Construction §§ 45.11 – 45.12 (5th ed. 1992). Our Court has not interpreted the ordinance in accordance with the plain meaning of § 11-7(a), nor given it a sensible meaning that would uphold its validity.

The Court's opinion also erroneously concludes that the City of Paducah ordinance fails to provide for "prompt judicial review" as required by *FW/PBS, Inc. v. City of Dallas* and our own Sixth Circuit precedent.

Nightclubs, Inc. bears the burden of proving to the court that the ordinance does not provide an avenue for prompt judicial review. *See FW/PBS*, 493 U.S. at 229-30 (explicitly declining to shift the burden of proof to the government in licensing scheme cases). The plaintiff has failed to meet that burden. Specifically, the plaintiff has failed to address the fact that this ordinance provides for prompt judicial review in any court of competent jurisdiction, including federal courts. The Court argues that the Kentucky procedures at issue provide for even more potential delay than do the Tennessee procedures this court found to require undue delay in *East Brook Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995). But the ordinance in that case, unlike the ordinance before us today, provided for appeal from an adverse decision by common law writ of certiorari to the state courts of Tennessee. *See id.* at 225. Where judicial review is limited in that manner, certainly a facial challenge that the limiting language precludes "prompt judicial review" has more of a chance of success. But how can an ordinance which allows judicial review "in any court of competent jurisdiction," and further urges that the matter be

"promptly reviewed" by the courts be declared to be facially invalid for not providing an avenue for prompt judicial review? Certainly *East Brooks Books* is distinguishable on that basis.

The Court relies on *FW/PBS* for the proposition that "prompt judicial review" requires more than access, without interference, to the judicial system. Instead, the Court essentially argues that in each case before it a federal court must examine the swiftness of a state court's procedures, regardless of the language in the ordinance itself, before deciding whether a prompt judicial determination on the merits of the action could potentially be reached. I do not believe that to be the intention of the Court in *FW/PBS*.

The broad language of *FW/PBS* holds only that "the possibility of prompt judicial review or an avenue for prompt judicial review" is required. *See FW/PBS*, 493 U.S. at 228-29. While some language in Justice Brennan's concurring opinion indicating that a "prompt judicial determination" might be required has caused discussion among the Circuit courts, several Circuits have agreed that "prompt judicial review" only means access to prompt judicial review. *See, e.g., Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999); *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (en banc); *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth.*, 984 F.2d 1319 (1st Cir. 1993). In addition, the Second Circuit has intimated that it would follow this line of reasoning. *See, Beal v. Stern*, 184 F.3d 117 (2d Cir. 1999) (noting, without deciding, that prompt access to judicial review in state courts would satisfy the Freedman test). I do not believe the Court intended for a prompt judicial determination to be required in a situation where the city has provided for the broadest type of judicial review within its powers. To find otherwise is to invalidate broadly-worded city ordinances on the basis of the swiftness or

slowness of that particular state's judicial procedures, a test that could force Circuits to come to seemingly arbitrary and inconsistent decisions based on the various procedures of the different state court systems within their reach. For these reasons, I do not believe *FW/PBS* requires the result the Court reaches here.

Even if a prompt judicial determination is required, the plaintiff in this case does not meet the burden of proving that it could not gain such a prompt judicial determination in some court of competent jurisdiction over the matter. In fact, the plaintiff does not even allege that in the case at hand the avenues for prompt judicial review were somehow inadequate. Access to the federal courts in this case was immediate, and a decision was rendered promptly (the ordinance was enacted on August 11, 1998, and after a hearing on October 1, 1998, the District Court for the Western District of Kentucky entered a final order granting in part and denying in part plaintiffs motion for a preliminary injunction on October 29, 1998). In addition, the spirit of the *Freedman* test, that undue suppression of constitutionally protected speech be avoided, is satisfied on these facts because, as the District Court pointed out in this case, the plaintiff may be granted a temporary restraining order or injunction under the Kentucky procedural rules after it initiates the judicial action. For these reasons, I believe that we should not invalidate on its face the section of the City of Paducah ordinance which explicitly states that it allows prompt judicial review in any court of competent jurisdiction for its failure to provide prompt judicial review.

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No. 99-1122

In The

Supreme Court of the United States

BOSS CAPITAL, INC.,

Petitioner,

vs.

CITY OF CASSELBERRY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Eleventh Circuit Court of Appeals improperly considered and determined a claim over which it had no jurisdiction.

II. Whether a provision allowing immediate access to the Court following a local government's denial of a permit satisfied the requirement of prompt judicial review.

PARTIES

The Petitioner is Boss Capital, Inc., a Florida corporation, the plaintiff in the still-pending District Court suit and the appellant in the Court of Appeals. Boss Capital has no parent corporation or subsidiaries.

The Respondent is the City of Casselberry, a Florida municipal corporation, the defendant in the District Court and the Appellee in the Circuit Court.

All the parties to the proceedings below are parties to this Petition.

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BASIS OF JURISDICTION

Petitioner Boss Capital alleges that this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The 11th Circuit Court of Appeals entered its opinion at issue on September 3, 1999. Boss Capital's Petition for Rehearing was denied by 11th Circuit Order of October 18, 1999.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Respondent City of Casselberry, Florida accepts the reference to pertinent constitutional provisions and statutes involved in this Petition. Any reference herein to the Petition for Writ of Certiorari shall be made by (PC-page # ___). Any reference to the opinions and Orders of the 11th Circuit Court of Appeals and the U.S. District Court for the Middle District of Florida relevant here, as attached in the Appendix to the Petition for Writ of Certiorari shall be made by (PCA- page # ___).

STATEMENT OF THE CASE

Respondent *generally* accepts the factual references in Petitioner's Statement of the Case. Respondent specifically objects, however, to argumentative allegations in Petitioners' Statement of the Case, including bald allegations for which there is no record citation whatsoever. (PC-4, fn. 1, 2).

Respondent will reserve for the argument portion of this Brief any response to those allegations, or reference

to relevant facts not cited in Petitioner's Statement of the Case.

ARGUMENT

I. Whether the Eleventh Circuit Court of Appeals improperly considered and determined a claim over which it had no jurisdiction.

Petitioner Boss Capital has no right to contest the 11th Circuit's affirmance of the District Court's entry of Summary Judgment for the City of Casselberry on Petitioner's attack on the constitutionality of the City's licensing provisions for adult entertainment businesses. The City's denial of Petitioner's application for an adult entertainment license resulted in Petitioner filing a lawsuit against the City in the Middle District of Florida. (PC-3). In that suit, Petitioner Boss Capital specifically challenged both the zoning *and* licensing regulations of the City, claiming they violated the First Amendment's guarantee of the right to free expression. (PCA-4a). Petitioner challenged the City's licensing provisions on the basis they failed to provide the procedural safeguards mandated by this Honorable Court in *Freedman v. Maryland*, 380 U.S. 51 (1965), et al. (PC-3).

In entering Summary Judgment for the City, the District Court upheld both the zoning *and* licensing ordinances for adult entertainment business in the City. (PCA-20A-47A). The District Court specifically found that the provision of the City ordinance allowing an unsuccessful applicant to immediately file suit and seek emergency relief in Court to challenge the application denial

complied with *Freedman* and its progeny. (PCA at 35A-36A).

Petitioner Boss Capital then appealed to the 11th Circuit. In its lengthy and learned opinion, that Court carefully recounted the undisputed facts below and the case authorities in this area starting with *Freedman, supra.* (PCA-1A-18A). After remanding to the District Court the limited zoning issue of the number of sites available inside the City limits for adult businesses, the 11th Circuit then analyzed the City's licensing ordinances. (PCA-7A-17A). After carefully fitting the City of Casselberry licensing ordinance into the series of opinions post-*Freedman,* the Court ultimately concluded that the City's licensing ordinance at issue does *not* give City officials too much unbridled discretion in deciding whether to issue licenses *and* that the Ordinance provided for prompt judicial review in compliance with *Freedman, supra.* (PCA-7A-14A).

For Petitioner Boss Capital to contend before this Honorable Court now on its *certiorari petition* that the 11th Circuit **"improperly"** considered and ruled upon Petitioner's own appeal of the District Court's denial of its attack on the City's licensing ordinance defies logic and fairness. It was *Boss Capital* that attacked the constitutionality of the City's licensing ordinances with the lawsuit filed in District Court. It was *Boss Capital* that appealed the District Court's decision that the City's licensing ordinances passed constitutional muster. It was *Boss Capital* that appealed that District Court finding to the 11th Circuit. Finally now, because it lost that argument at the District Court *and* Circuit Court level, it is *Boss Capital* that has the gall to assert that the 11th Circuit

should never have considered and ruled upon the very appeal that *Boss Capital* brought to that Court.

Nothing in the brief argument in Boss Capital's Petition on this point demonstrates to the contrary, or supports its bald allegation that the 11th Circuit should have never considered Boss Capital's own appeal on the constitutionality of the City's licensing ordinance. There is no dispositive legal and factually on-point support cited for Boss Capital's attempt to rely upon the **"basic constitutional rule of standing,"** as applied to the facts here. (PC-5). That rule generally applies at the *outset* of a suit, when a Court may find that a party which filed a suit attacking a statute or ordinance has no standing because that party cannot obtain any relief. But Boss Capital still *seeks* relief through its own lawsuit and appeal, which attack both the zoning *and* licensing ordinances.

Simply because the 11th Circuit remanded a portion of the case to the District Court for a final determination of facts relevant to the *zoning* issue does not make the Circuit Court's learned opinion on the appeal brought by Boss Capital on the *licensing* issue moot. In fact, once the case returns to the 11th Circuit after expedited determination of the factual inquiry by the District Court, a final decision will be made on both the zoning *and* licensing appeals brought by Boss Capital against the City. If the Summary Judgment on the City's zoning regulations is *reversed*, Boss Capital's claim for relief lives on.

In this undisputed context, Boss Capital is simply making a last gasp attempt in its Petition to this Honorable Court for reversal of the otherwise solid and

unassailable affirmance by the 11th Circuit of the District Court's well-reasoned entry of Summary Judgment in favor of the City on Boss Capital's attack against its licensing ordinance. Obviously, Boss Capital has no other grounds to seek this Court's *certiorari* jurisdiction for its defeat at the 11th Circuit besides the effort it makes in the argument to Point II in this Petition. (See below). But its argument on standing – " . . . **that since the panel had not struck the zoning provisions, it should not have reached the issue of the constitutionality of the licensing sections . . .** " (PC-9) – ignores the obvious fact that it was Boss Capital *itself* that filed suit against the City attacking the constitutionality of the licensing provisions *and* filed the appeal with the 11th Circuit on that very issue when it lost below. This new issue of standing was then not raised until Boss Capital's Petition for Rehearing was filed in the 11th Circuit, and it was properly denied without opinion after the Circuit Court considered it. (PCA-19A).

No Court has found that a disgruntled license-seeker who sues a governmental body as a result of its application denial then appeals to a Circuit Court its loss at the trial court level has suddenly lost its standing in mid-appeal. Nor is there any support for Boss Capital's bald allegation in its Petition that the 11th Circuit's opinion herein declares that, " . . . **any party can challenge a licensing ordinance whether or not that party can ever obtain a license, and whether or not a successful challenge could ever benefit anyone!**" (PC-7).

It is no wonder Petitioner did not cite to the 11th Circuit's opinion in making that bald remark, since that statement or even implication cannot be found anywhere

in the opinion. More importantly, Petitioner Boss Capital had standing from the outset of its lawsuit to challenge the licensing ordinance as it did, because of its claim that its application was denied on *allegedly* unconstitutional grounds. (PC-4). It still has that standing, and this case is still being litigated at the District Court.

Nothing in this Honorable Court's opinion in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) supports Petitioner's argument on the standing issue here. Though this Court's opinion there did involve the jurisdictional issue of standing, its holding on that issue has nothing to do with the facts here. As Petitioner Boss Capital concedes in its Petition, in that case,

> **" . . . the Court stated very clearly that when it does not appear affirmatively on the record that some party has an interest in the outcome of a challenge to a particular claim, the federal courts cannot entertain that challenged." (PC-8).**

Here, quite obviously, Boss Capital has an interest in the outcome of its challenge to the constitutionality of the City of Casselberry's licensing ordinance provisions. There, this Court noted that the attack on the two Dallas ordinance provisions at issue:

1. That a person was not eligible to receive a license if he or she were living with another person who had a license denied or revoked, and

2. That a person who had been convicted of certain crimes or offenses was disqualified. (PC-8)

resulted in the conclusion that there was no party before the Court who was living with an individual whose

license application was denied or license revoked, and no party subject to disqualification because of prior conviction. *FW/PBS*, 493 U.S. at 233-34. Thus the lack of standing was clear on the record.

But here Boss Capital continues to be a plaintiff with standing to attack the constitutionality of the City of Casselberry's licensing *and* zoning ordinances related to adult businesses. It has never lost that standing, since its application denial is still on the record and its attack on the City's zoning regulations continues to be litigated on remand to the District Court. (PCA-14A).

Perhaps most importantly, Boss Capital has failed to alert this Honorable Court either in its Statement of Facts or Argument on this issue to the ultimate conclusion of the 11th Circuit relevant hereto:

> **"Boss Capital also contends that Casselberry's adult entertainment licensing ordinance is invalid because it gives licensing officials too much discretion in violation of *Shuttlesworth*. Whatever the merits of this argument, we conclude that Boss Capital has not preserved this issue for appeal. Boss Capital's first Complaint raised the issue, but Casselberry has since repealed one of the provisions to which Boss Capital initially objected. After that, Boss Capital scarcely mentioned the issue before filing its Brief with us. The District Court did not address the issue. This is not enough to preserve an issue for appeal, so we decline to address it. *See, Resolution Trust Corp. v. Dunmar Corp.*, 43 F. 3d 587, 599 (11th Cir. 199) (*en banc*)."** (PCA-10A-11A).

In that context, this Honorable Court should hardly exercise its *certiorari* jurisdiction over this last gasp attempt to raise an issue that has no relevance to the undisputed facts below. Contrary to Petitioner's closing argument on this issue, Boss Capital continues to seek its license through the original litigation it filed in the District Court, its appeal to the 11th Circuit, and now this Court. On remand, the District Court may find other locations in the City where a party may apply for a license, or under the City's ordinance Boss Capital may seek a license to take over one of the adult entertainment businesses already in the City.

Simply put, Boss Capital fails to demonstrate why either the District Court or the Circuit Court should not have ruled on Boss Capital's own attacks on the constitutionality of the City's licensing provisions, whether or not its simultaneous attack on the constitutionality of the City's zoning restriction was won or lost. Both Boss Capital and the City were entitled to federal adjudication of these constitutional attacks. Simply because Boss Capital has lost one of the attacks and its other has been remanded for further inquiry at the District Court level hardly qualifies it as a party no longer having the requisite standing, since it quite clearly has a substantial and continued interest in the final outcome of its attacks. (See, i.e., Boss Capital's argument to Point II in its Petition).

Simply because Boss Capital's appeal has been allowed to continue demonstrates it has a sufficient stake in the continuing litigation to show its standing. *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 334, 100 S. Ct. 1166, 63 L. Ed. 2d 417 (1980) (appeal may be taken by prevailing party so long as that party retains a stake).

Having proven its standing to challenge the constitutionality of the City's ordinances at both the District Court and Circuit Court levels, it is disingenuous for Boss Capital to now argue its own *lack* of standing in its own appeal here to the Supreme Court.

Throughout this litigation, Boss Capital has attacked both the zoning *and* licensing ordinances of the City of Casselberry, and continues to do so in this Petition. It should hardly be allowed now to allege its own *lack* of standing to attack the licensing provisions, because it *continues* its attack on the zoning ordinances. Boss Capital should be hoist on its own petard here, both as a matter of fairness and logic.

Nothing in the case law authorities or arguments it makes very briefly on this particular point demonstrates to the contrary. Thus the Respondent City of Casselberry respectfully submits that Boss Capital's Petition to this Honorable Court should be DENIED.

II. Whether a provision allowing immediate access to the Court following a local government's denial of a permit satisfied the requirement of prompt judicial review.

Petitioner Boss Capital, Inc. argues that the City of Casselberry's licensing provisions for adult entertainment businesses does not provide for the required **"prompt judicial review."** But the City's pertinent Ordinance specifically states:

> **"(c) JUDICIAL REVIEW. Any decision of the Community Development Department, pursuant to Division 2 (License) may be**

> ***immediately reviewed*** **as a matter of right by the Circuit Court upon the filing of an appropriate pleading by an aggrieved party." (PCA-17A).**

The District Court granted Summary Judgment for the City of Casselberry on Boss Capital's attack on that ordinance's constitutionality. (PCA-47A). The 11th Circuit Court *affirmed*, appropriately finding under our system of checks and balances that, **" . . . a general right to judicial review of an administrative decision may be enough."** (PCA-8A).

The Court noted that Casselberry's Ordinance contains the explicit judicial review provision quoted above. Thus it squarely confronted the issue now raised in this Petition, whether this Honorable Court's prior opinions, **" . . . require a guarantee of prompt judicial resolution of license denials."** (PCA-6A-7A).

The Circuit Court first noted Justice O'Connor's plurality opinion in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), which states:

> "**There must be the possibility** of prompt judicial review in the event that (a) license is erroneously denied." *F.W./PBS* 493 U.S. 228 (Emphasis added). (PCA-7A).

In *FW/PBS*, it was emphasized that the Dallas ordinance there violated the First Amendment because it *failed* to provide, **" . . . an avenue for prompt judicial review."** *Id.* at 229 (emphasis added). But Justice Brennan's concurring opinion, while not disagreeing with the Court's plurality opinion on this issue, referred to the

right of prompt judicial review as the right to **"a prompt judicial determination."** *Id.* at 239.

This difference between Justice O'Connor's and Justice Brennan's interpretations of the right to prompt judicial review has caused a split in the Circuit Courts, which can certainly be tolerated like many others by this Honorable Court. The 11th Circuit in the *Boss Capital* opinion at issue *joined* the First, Fifth and Seventh Circuits in holding that prompt judicial review for licensing decisions mean *access* to prompt judicial review, not the right of the executive branch to mandate how quickly the judicial branch does its business. *See, Boss Capital,* (PCA-9A); *Jews for Jesus, Inc. v. Mass Bay Transp. Auth.,* 984 F. 2d 1319, 1327 (1st Cir. 1993); *TK's Video, Inc. v. Denton County,* 24 F. 3d 705, 709 (5th Cir. 1994); *Grand Brittain, Inc. v. City of Amarillo,* 27 F. 3d 1068, 1070 (5th Circ. 1994); *Graff v. City of Chicago,* 9 F. 3d 1309, 1324-25 (7th Cir. 1993) *en banc.*

In the 11th Circuit opinion at issue in this Petition, that Court ultimately concluded that this Court's opinions in *Freedman v. Maryland,* 380 U.S. 51 (1965) and *FW/PBS, supra,* may intend a requirement of prompt judicial *resolution* of *censorship* decisions, **" . . . but in the end we conclude that access to prompt judicial review is sufficient for licensing decisions."** (PCA-8A) (emphasis applied). As the Court notes, *Freedman* and its progeny involve censorship, not licensing ordinances. (PCA-9A). *Freedman,* for example, resulted from a State law which authorized public officials to ban immediately movies they found obscene. (380 U.S. at 52-53, n.2). But as the 11th Circuit properly found in arriving at an important distinction below:

> **"The dangers of censorship are less threatening when it comes to licensing schemes. Unlike censors, who pass judgment on the content of expression, licensing officials look at more mundane and ministerial factors in deciding whether to issue a license. See, *11126 Baltimore Blvd.* 58 F. 3d 988, 1003 (4th Cir 1995) (*en banc*) (no need for a guarantee of a prompt judicial decision in the absence of a direct restraint on speech); See also, *FW/PBS*, 493 U.S. at 229, 110 S. Ct. 596 (licensing officials do not pass judgment 'on the content of any protective speech'; rather they look at 'the general qualifications of each license applicant, a ministerial action that is not presumptively invalid.')**
>
> **"Indeed, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S. Ct. 935 (1969) limits licensing officials to the mundane and the ministerial. See, *Lady J. Lingerie*, 176 F. 3d at 1362 . . . furthermore, applicants for adult entertainment licenses, unlike movie distributors who might show a given film in hundreds of theaters around the country, have every incentive to stick it out and see litigation through to its end. Cf. *FW/PBS*, 493 U.S. at 229-30, 110 S. Ct. 596 (plurality opinion) (no need to put burden of going to court and burden of proof on licnsing officials because license applicants have the incentive to go to court). The need for a prompt judicial decision is therefore less compelling for licensing ordinances than for censorship schemes." (PCA-9A-10).**

That reasoning of the 11th Circuit is logical and compelling, and should not be disturbed here. In *FW/PBS*,

this Court set out two requirements for licensing ordinances on adult entertainment businesses such as the one at issue here. The licensing process must provide for definite time limits within which a license is to be granted or denied, and an avenue for prompt judicial review must be established. *Id.* The Casselberry Ordinance clearly satisfies both requirements. Boss Capital does not even argue any problem with the requirement for prompt decision-making on granting or denying the application for a license. Nor does Boss Capital argue any longer, as it did below, that the licensing ordinance is either overbroad or, " . . . **vests unbridled discretion in the decision-maker.**" *FW/PBS*, at 223.

But as to the issue of prompt judicial review that *is* argued by Boss Capital in its Petition, it ignores this Court's holding that it is the license *applicant* who bears the burden of proving to the Court that the denial was improper under the law and particular facts. Boss Capital failed to bear the burden here and below of proving to the Court that the City Ordinance does not provide an avenue for prompt judicial review. *See, FW/PBS*, 493 U.S. at 229-30 (explicitly declining to shift the burden of proof to the government in licensing ordinance cases).

How can an Ordinance which allows a licensing decision to, " . . . **be immediately reviewed as a matter of right** . . . ," be declared invalid for not providing an avenue for prompt judicial review? (PCA-17a). Certainly that fact distinguishes the facts here from the 6th Circuit's opinion in *East Brook Brooks, Inc. v. City of Memphis*, 48 F. 3d 220 (6th Cir. 1995), where judicial review of an adverse decision was limited solely to the filing of a Petition for the Common Law Writ of Certiorari. *Id.* Here,

the applicant can immediately file any **"appropriate pleading"** for immediate review by the Courts, including an Emergency Motion for Preliminary Injunction. (PCA-17A).

The holding in *FW/PBS* requires only that the **"possibility of prompt judicial review"** or **"an avenue for prompt judicial review"** be present. *FW/PBS* at 493 U.S. 228-29. The Second Circuit has implied that it would follow the logic and reasoning of the First, Fifth, Seventh and Eleventh Circuit Courts, in finding that **"prompt judicial review"** can only mean *access* to prompt judicial review. *See, Beal v. Stern,* 184 F. 3d 117 (2nd Cir. 1999) (noting, without deciding, that prompt access to judicial review in State Courts would satisfy the *Freedman* test).

It does not appear that this Honorable Court in *FW/PBS* intended for a prompt judicial *determination* to be *required* in a situation where a City's ordinance provides for the broadest type of judicial review within its powers. To find otherwise is to invalidate broadly-worded ordinances solely on the basis of the swiftness or slowness of that particular locale's judicial procedures. Yet this is what Petitioner Boss Capital seeks here: either a test that could force the federal circuit courts to reach arbitrary and inconsistent decisions based upon the various procedures of the different state court systems within their jurisdiction, or a requirement that cities allow adult entertainment businesses to open their doors and proceed to their business despite facially valid grounds for license denial, while the *local governments* bear the burden of seeking *approval* of their decisions from the judicial branch.

Surely that is not the result mandated by this Honorable Court in *FW/PBS*. Even if a prompt judicial *determination* is required, as argued by the Petitioner here, this Petitioner never met its burden of proving below or now that it could *not* gain such a prompt judicial determination in a Court of competent jurisdiction over the matter. In fact, Petitioner does not even allege in this case that its avenues for prompt judicial review are somehow inadequate.

Perhaps most importantly, the spirit of the *Freedman* test, that undue suppression of constitutionally protected speech must be avoided, is satisfied here. Petitioner Boss Capital may be granted an emergency preliminary injunction or temporary restraining Order under the Florida Rules of Procedure immediately after it initiates immediate judicial action. Nothing in the Petition filed by Boss Capital demonstrates to the contrary.

For these reasons, and for those more eloquently set forth in the 11th Circuit's 14-page opinion at issue, the Respondent City of Casselberry, Florida respectfully submits that this Honorable Court should not exercise its *certiorari* jurisdiction over this matter. This Court should *not* invalidate the section of the City of Casselberry's Ordinance which explicitly states that it allows for immediate judicial review as a matter of right to the unsuccessful applicant. This Court should not allow its *Freedman* or *FW/PBS* opinions to be interpreted to *mandate* that the executive branch at the local government level must force its local judicial branch to alter or accelerate its procedures beyond the avenues for emergency relief it already provides.

Accordingly, the 11th Circuit Court in the *Boss Capital* decision at issue agreed with the First, Fifth and Seventh Circuits in holding that prompt judicial review is sufficient for decisions on adult entertainment licensing applications such as the one at issue here. Thus the Respondent City of Casselberry's Ordinance, which clearly provides for immediate review **"as a matter of right by the Circuit Court"** does not run afoul of this Court's opinion in *Freedman* or *FW/PBS*. Boss Capital's Petition for the issuance of a Writ of Certiorari from this Honorable Court should be DENIED.

CONCLUSION

For all the reasons stated herein or to be gleaned from a review of the District Court's and 11th Circuit Court's opinions at issue herein, the Respondent City of Casselberry, Florida respectfully submits that Petitioner Boss Capital, Inc. has failed to carry its burden of proving that this Honorable Court's exercise of its *certiorari* jurisdiction is compelled here. Thus the Respondent City of Casselberry respectfully submits that the Petition for the Writ of Certiorari filed herein by Petitioner Boss Capital should be DENIED.

Respectfully submitted,

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